83-411

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GULF OIL CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
PHILADELPHIA GAS WORKS,
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
WASHINGTON URBAN LEAGUE,
Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. MITCHELL REESE
Post Office Box 3725
Houston, Texas 77253
(713) 754-9739

WARREN M. SPARKS
SPARKS & SPARKS
608 Franklin Building
Tulsa, Oklahoma
(918) 587-2368

CARROLL L. GILLIAM *
CRAIG W. HULVEY
J. PAUL DOUGLAS
1730 M Street, N.W.
Washington, D.C. 20036
(202) 296-2900

Attorneys for Petitioner Gulf Oil Corporation

* Attorney of Record

Of Counsel:
GROVE, JASKIEWICZ, GILLIAM AND COBERT
1730 M Street, N.W.
Washington, D.C. 20036

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 82-3035, 82-3132, 82-3137, 82-3166/67 and 82-3242

GULF OIL CORPORATION,
Petitioner in No. 82-3035,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PHILADELPHIA GAS WORKS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PUBLIC SERVICE ELECTRIC AND GAS COMPANY, NEW JERSEY NATURAL GAS COMPANY, WASHINGTON URBAN LEAGUE, THE BROOKLYN UNION GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors.

GULF OIL CORPORATION,
Petitioner in No. 82-3132,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PHILADELPHIA GAS WORKS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, WASHINGTON URBAN LEAGUE, and TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors.

WASHINGTON URBAN LEAGUE,
Petitioner in No. 82-3137,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PHILADELPHIA GAS WORKS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION, and GULF OIL CORPORTION,
Intervenors.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner in No. 82-3166,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

GULF OIL CORPORATION, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPOTATION,
Intervenors,

THE BROOKLYN UNION GAS COMPANY,
Intervenor.

PHILADELPHIA GAS WORKS,
Petitioner in No. 82-3167,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

GULF OIL CORPORATION, TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors,

THE BROOKLYN UNION GAS COMPANY,
Intervenor.

GULF OIL CORPORATION,
Petitioner in No. 82-3242

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PUBLIC SERVICE ELECTRIC AND GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors,

WASHINGTON URBAN LEAGUE,
Intervenor.

PETITION FOR REVIEW
FEDERAL ENERGY REGULATORY COMMISSION
(CI64-26)

Argued January 7, 1983

Before: ALDISERT, GIBBONS and HIGGINBOTHAM,
Circuit Judges

(Filed April 21, 1983)

ROBERT W. FULLER, ESQ.
LAWRENCE E. GLENN, ESQ.
Post Office Box 3725
Houston, Texas 77253

WARREN M. SPARKS, ESQ.
SPARKS & SPARKS
608 Franklin Building
Tulsa, Oklahoma 74103

CARROLL L. GILLIAM, ESQ. (argued)
CRAIG W. HULVEY, ESQ.
KEVIN SWEENEY, ESQ.
1730 M Street, N.W., Suite 501
Washington, D.C. 20036
Attorneys for Gulf Oil Corporation,

Of Counsel:
GROVE, JASKIEWICZ, GILLIAM and COBERT
1730 M Street, N.W., Suite 501
Washington, D.C. 20036
Attorneys for Petitioner in Nos. 82-3035, 82-3132, 82-3242; Attorneys for Intervenor in Nos. 82-3137, 82-3166, 82-3167.

CHARLES A. MOORE, ESQ.
General Counsel
JEROME M. FEIT, ESQ.
Solicitor
JOSHUA Z. ROKACH, ESQ. (argued)
Federal Energy Regulatory Commission
Washington, D.C. 20426
Attorneys for Federal Energy Regulatory Commission, Respondents in Nos. 82-3035, 82-3132, 82-3137, 82-3166, 82-3167, 82-3242.

JOSEPH R. DAVISON, ESQ. (argued)
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor, Packard Building
S.E. Corner 15th & Chestnut Streets
Philadelphia, PA 19102
Attorney for Philadelphia Gas Works, Intervenor in Nos. 82-3035, 82-3132, 82-3137; Petitioner in No. 82-3167.

DAVID E. BLABEY, ESQ.
General Counsel
Public Service Commission of the State of New York
3 Empire State Plaza
Albany, New York 12223

RICHARD A. SOLOMON, ESQ. (argued)
DENNIS LANE, ESQ.
WILNER & SCHEINER
1200 New Hampshire Avenue, N.W., Suite 300
Washington, D.C. 20036

Attorneys for The Public Service Commission of the State of New York, Intervenor in Nos. 82-3035, 82-3132, 82-3137; Petitioner in No. 82-3166.

WILLIAM I. HARKAWAY, ESQ.
MCCARTHY, SWEENEY & HARKAWAY
1750 Penn. Ave., N.W.
Washington, D.C. 20006

Attorney for Consolidated Edison Company of New York, Inc., Intervenor in No. 82-3035.

JAMES R. LACEY, ESQ.
WILLIAM R. HOATSON, ESQ. (argued)
P.O. Box 570-5E
Newark, New Jersey 07101

Attorney for Public Service Electric and Gas Company, Intervenor in Nos. 82-3035, 82-3137, 82-3166, 82-3242.

NICHOLAS W. MATTIA, JR., ESQ.
CONWAY, REISEMAN, BUMGARDNER & KLEINFELD
50 Park Place
Newark, New Jersey 07102

Attorney for New Jersey Natural Gas Company, Intervenor in No. 82-3035.

MORTON L. SIMONS, ESQ. (argued)
1629 K Street, N.W.
Washington, D.C. 20006

CHARLES E. HILL, ESQ.
236 Massachusetts Avenue, N.E.
Washington, D.C. 20002

Attorneys for Washington Urban League, Petitioner in No. 82-3137; Intervenor in Nos. 82-3035, 82-3132, 82-3242.

JAMES W. MCCARTNEY, ESQ.
JUDY M. JOHNSON, ESQ.
J. CRAIG YOUNGBLOOD, ESQ. (argued)
VINSON & ELKINS
3300 First City Tower
Houston, Texas 77002

JACK E. EARNEST, ESQ.
JACK D. HEAD, ESQ.
CHERYL M. FOLEY, ESQ.
P.O. Box 2521
Houston, Texas 77001

Attorneys for Texas Eastern Transmission Corporation, Intervenor in Nos. 82-3035, 82-3132, 82-3137, 82-3166, 82-3167, 82-3242.

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This appeal challenges six separate orders of the Federal Energy Regulatory Commission ("FERC" or "the Commission"[1]). The litigation stems from the failure of the Gulf Oil Corporation ("Gulf") to deliver specified daily quantities of gas to Texas Eastern Transmission Corporation ("Texas Eastern") pursuant to the requirement of a 1963 contract and a certificate of convenience and necessity. In *Gulf Oil Corp. v. Federal Power Commission*, 563 F.2d 588 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978) ("Gulf Oil I"),[2] this court affirmed a 1976 Commission order holding that Gulf had not complied with its certificate and contract obligations involving gas delivery as well as establishing daily warranty requirements and imposing fund-recoupment duties. The court left to the Commission's determination the details of the refund-recoupment payment plan. In conducting this subsequent proceeding, the Commission bifurcated the case into (a) those issues relating to the mechanics of the refund-recoupment; and (b) those issues concerning *force majeure*. There are three issues on appeal here. They are: (1) whether the Commission properly fashioned the refund-recoupment payment plan by ordering Gulf to pay into an escrow fund the amount due with

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[1] The term "Commission" refers to action taken by the Federal Power Commission, (FPC), prior to October 1, 1977 and the actions of the FERC after that date.

[2] The numerical indication of the cases refers to this court's review of the Commission orders relating to the 1963 contract between Gulf Corporation and Texas Eastern Corporation and the subsequent certificate of convenience and necessity issued to Gulf by the FERC. This court's second review of a Commission order relating to that contract and certificate is found in Gulf Oil v. FERC, 575 F.2d 67 (3d Cir. 1978) (*"Gulf Oil II"*). That case affirmed the Commission's decision to deny Gulf's application to abandon sales of natural gas to Tennessee Gas Pipeline Company in order to use the reserves to meet its obligation to Texas Eastern.

interest for past underdeliveries of gas through December 15, 1976;[3] (2) whether the Commission erred as a matter of law in its findings that approved Gulf's claims that certain volumes of gas could be attributed to *force majeure* and thereby reduce its refund payment;[4] and (3) whether the Commission properly granted standing to the Washington Urban League ("WUL"), as an intervenor, to seek rehearing of the Commission's orders

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[3] This court has consolidated appeals docketed as Nos. 82-3035, 82-3132, and 82-3137. At issue is the Commission's establishment of a plan for Gulf's computation of refunds for underdeliveries to Texas Eastern as a result of a breach of the warranty contract. The review in those two cases arises from the FERC orders of January 17, 1979 (I App.-B, p. 143), December 18, 1981 (I App.-B, p. 363), and March 29, 1982 (I App.-B, p. 517). Gulf Oil is the petitioner and the FERC the respondent in both 82-3035 and 82-3132. In 82-3132, the respondent intervenors are the Philadelphia Gas Works, the Public Service Commission of the State of New York, Texas Eastern Corporation and The Washington Urban League. The respondent intervenors in 82-3035 are the Philadelphia Gas Works, the Public Service Commission of the State of New York, Consolidated Edison Company of New York, Inc., Public Service Electric and Gas Company, New Jersey Natural Gas Company, Washington Urban League, the Brooklyn Union Gas Company, and Texas Eastern Transmission Corporation. In No. 82-3137, the Washington Urban League is the petitioner. The FERC is the respondent and the Philadelphia Gas Works, the Public Service Commission of the State of New York, the Public Service Electric and Gas Company, Texas Eastern Transmission Corporation and the Gulf Oil Corporation are the respondent intervenors.

[4] In Docket Nos. 82-3166 and 82-3167, the petitioners challenge the FERC order of January 22, 1982 (Opinion No. 136) (II-App., p. 27), determining whether those volumes of gas attributable to *force majeure* events are accurate and reasonable. In Docket Nos. 82-3166 and 82-3167, the Public Service Commission of the State of New York and the Philadelphia Gas Works, Gulf Oil Corporation, Public Service Electric and Gas Company, Texas Eastern Transmission Corporation, and the Brooklyn Union Gas Company are respondent intervenors in No. 82-3166. In 82-3167, the intervenors are the same with the omission of the Public Service Electric and Gas Company.

on the refund payment plan.[5] Gulf urges that the Commission's orders regarding the refund-recoupment payment be set aside. Several intervening parties urge with the FERC that the orders be affirmed. In the *force majeure* portion of the proceeding, Gulf as an intervenor joins the FERC and urges that the Commission's order be enforced in full. The petitioners, the Public Service Commission of New York ("PSCNY") and the Philadelphia Gas Works ("PGW"), oppose the Commission's order. The final petition for review is brought by Gulf Oil in opposition to FERC order granting standing to the Washington Urban League ("WUL"), an intervenor, to seek rehearing of the Commission's refund payment orders. Finding no merit in petitioners' challenges to the refund-recoupment payment plan and to the WUL's standing,[6] we will deny these petitions to set aside the Commission's orders. We will grant the petition to set aside the Commission's order on the *force majeure* issue, and address that single issue in this opinion.

I.

A. *Gulf Oil I.*

The present case relates to earlier litigation between the Gulf Oil Company and the FERC. Section 7(c) of

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[5] No. 82-3242 is an appeal of the Commission orders of March 29, 1982 (*reprinted* I App.-B p. 517) and of April 12, 1982 (II App. p. 67), denying rehearing of Opinion No. 136. Respondent intervenors are the Public Service Electric and Gas Company, Texas Eastern Transmission Corporation and the Washington Urban League.

[6] On January 15, 1982, Gulf filed an application for rehearing and reconsideration of the Commission's December 18, 1981 order. On January 18, 1982, WUL also filed an application for rehearing. Gulf now challenges WUL's standing to file that application. We need not decide whether WUL is an aggrieved party within the meaning of the Natural Gas Act, 15 U.S.C. § 717r(b). The substantive issues which WUL raises are appropriately before us because they have been raised by Gulf.

the Natural Gas Act of 1938, 15 U.S.C. § 717(c) (1970), gives the Commission supervisory power over the sale of natural gas. The Commission executes these duties in part by issuing a certificate of "convenience and necessity" to the seller. In 1963, Gulf Oil applied for such a certificate to distribute gas to Texas Eastern for a twenty-six year period. The certificate that FERC issued to Gulf mirrored the contract terms between Gulf and Texas Eastern.

In 1975, the Commission initiated a show cause order against Gulf for alleged contract violations and against Texas Eastern because it had not submitted a complaint to the agency about the violations. Gulf's failure to meet contract requirements goes back to 1971, when Gulf applied to the Commission to amend its certificate because it had mistakenly estimated the supply of one of its reserve fields.[7] Gulf's deliveries to Texas Eastern fell short of Texas Eastern's demands beginning in 1973; beginning in 1974, Gulf's deliveries fell short of the contract specified quantities. The Commission held that Gulf failed to comply with both its certificate of operation and its 1963 contract obligation with Texas Eastern. (FERC Opinions No. 780, I App.-B, p. 60-81, No. 780-A, p. 82-102). The Commission ordered Gulf to deliver a maximum of 625 Million cubic feet ("Mmcf") daily and it prescribed a "refund-recoupment" formula for reimbursement to Texas Eastern and its customers for the undelivered volumes of gas. The formula included an offset

---

[7] Gulf applied to the Commission for an amendment to its certificate in 1971. Gulf asked for an increase in the case purchase price under the contract stating that it had overestimated the reserves available from one of its sources of supply, the West Delta Block 27. The Commission denied the application on the grounds that Gulf's obligations to deliver the gas to Texas Eastern at the certificate price were unconditional and not dependent upon a specific source of gas. (II App. p. 17).

to the refund-recoupment up to the allowable *force majeure* volumes as provided in Article X of the contract.[8]

Gulf Oil appealed the Commission's opinions and this court affirmed them in their entirety in *Gulf Oil I*. We

---

[8] Article X of the contract lists twenty-seven possible *force majeure* events and also contains a standard disclaimer clause. Article X reads in part:

> X. FORCE MAJEURE
>
> In the event of either party hereto being rendered unable, wholly or in part, by force majeure to carry out its obligations under this Agreement, other than to make payments due hereunder, it is agreed that on such party giving notice . . . then the obligations of the party giving such notice, as far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused . . . and such cause shall as far as possible be remedied with all reasonable dispatch. The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accidents to machinery or lines of pipe, the necessity for making repairs to or alterations of machinery or lines of pipe, freezing of wells or lines of pipe, the failure of production facilities for causes other than depletion of the source of gas supply, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension; provided, however, that said term shall not mean or include any cause which by the exercise of due diligence the party claiming force majeure is able to overcome; and provided, further, that in no event shall said term mean or include partial or entire failure or depletion of gas reserves or sources of supply of gas. Such term shall likewise include (a) in those instances whether either party hereto is required to obtain servitudes, rights of way grants, permits or licenses to enable such party to fulfill its obligations hereunder, the inability of such part to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such servitudes, rights of way . . . .

therefore made several determinations which are binding in the instant case. First, *Gulf Oil I* settled the dispute of daily contract requirements. The court required Gulf to deliver daily a minimum of 500 Mmcf and a maximum of 625 Mmcf, unless Texas Eastern demanded less, until the contract expired. Over the life of the contract, Gulf was to deliver to Texas Eastern a total of 4.4 Trillion cubic feet ("Tcf"). Secondly, the court expressly rejected Gulf's contention that the failure of the Department of Interior to hold offshore lease sales constituted *force majeure* which excused Gulf from meeting its required daily quantity. The court found that Gulf's mistaken estimate of the sources of gas supply, which increased the need for offshore leases, was not the type of mistake included in the *force majeure* clause. The court further determined that the Gulf contract was a warranty contract and not a contract conditioned on the supply of available gas. Finally, the court found that the Commission had proper authority to design a remedy of refunds and recoupment of refunds to Texas Eastern and its customers consisting of an amount of money equal to the deficiencies in the daily delivery obligations.

The Comission's order as affirmed by the court in *Gulf Oil I* required Gulf to file regular reports computing the refunds attributable to the underdeliveries. (I App. p. 77). The Commission also ordered Gulf to "recoup refunds" through surcharges when the volumes remaining to be delivered under the contract equaled the volumes of prior underdeliveries. (I App. p. 78). Gulf was directed to tender refund payments to Texas Eastern within 30 days after the Commission approved Gulf's computations. The Commission directed Texas Eastern to survey its customers and the affected state regulatory commissions and to file a plan for the flow through of Gulf's payments. (I App. p. 78). The Commission contemplated that further proceedings would be held as to the distribution of the refund payments and the calcula-

tion of those volumes attributable to *force majeure*. (I App. p. 90).

B. *Later Commission Proceedings.*

1. *The Force Majeure Hearing.*

The Commission's decision of January 17, 1979 ordered a formal hearing before an Administrative Law Judge (ALJ) to resolve specified issues involving *force majeure* (II App. 1-9). The Commission's order directed the ALJ to determine the accuracy and reasonableness of allowable *force majeure* volumes as designated in Article X. The hearing afforded Gulf an opportunity to show *force majeure* events under the contract which would excuse its daily delivery obligations (II App. p. 7-8).

Gulf argued that its daily warranty obligation required it to have available a maximum of 625 Mmcf less *force majeure* volumes (II App. p. 23). Gulf supported this claim on the theory that in order to produce a daily maximum of 625 Mmcf, Gulf would have to obtain gas from the fields ordinarily relied upon in addition to the reserve fields. Consequently Gulf would have been required to use all of its fields to produce the daily quantity. Gulf contended that its existing source of supply was insufficient to meet this demand. Gulf did not show whether it has sufficient quantities of gas available from specific fields to meet even its minimum daily obligation of 500 Mmcf.

To prove its *force majeure* claims, Gulf produced the "downtime" reports that it prepared whenever a field was shut down for any amount of time. Gulf prepared these reports immediately following each such incident and regularly notified Texas Eastern of its occurrence. Gulf classified each downtime as a *force majeure*. A shutdown occurred routinely, almost daily. Gulf's testimony also showed the use of preventive maintenance techniques to minimize the loss of production from shut-

down fields. It appears that Texas Eastern never questioned Gulf's *force majeure* claims. (II App. p. 20-21).

Gulf showed a total deficiency of 307.2 Billion cubic feet ("Bcf") for the period August 1971 through December 1978. It catalogued by date the volumes of gas from particular fields *not delivered* to Texas Eastern. Gulf attributed 84.4 Bcf or about 27.5% of the undeliveries to *force majeure*. Therefore, it claimed that these were exempt from the refund calculation. (II App. p. 20).

Gulf classified the *force majeure* volumes according to contract provisions. Out of the total number of undelivered volumes due to *force majeure*, Gulf attributed 71.3% to "repairs to or alterations of machinery or lines of pipes"; 8.8% to pipe breakage; 8.7% to factors outside the "control of [Gulf]"; 7.6% to "storms"; 2.7% to "the failure of production facilities for causes other than depletion of the source of gas supply"; and 1% to "[frozen] . . . wells or lines, of pipes." (II App. p. 21).

WUL and other intervenors moved to strike Gulf's evidence at the conclusion of Gulf's evidentiary presentation on *force majeure* as insufficient as a matter of law. The ALJ treated the motion as a motion for summary judgment against Gulf, and granted it. (II App. pp. 12-26).

The ALJ held that Gulf had not made out a *prima facie* case to establish *force majeure* volumes. The ALJ required Gulf to establish a causal connection between the failure to deliver the volumes of gas that Texas Eastern demanded and alleged *force majeure* events. Consequently, in addition to cataloguing *force majeure* events that precluded Gulf from fulfilling delivery obligations, the ALJ required Gulf (1) to show that it was not able to produce gas from other sources to make up the deficiency; (2) to disclose the gas fields from which it ordinarily met Texas Eastern's daily delivery demands;

(3) to show that all of its fields, the regular sources of supply as well as the reserve fields, were not capable of delivering the maximum amount of gas that Texas Eastern could demand; and (4) to establish that other sources of supply were unavailable to make up the deficiency. The ALJ found that only after showing these four requisites would Gulf have laid a foundation for excusing its non-performance because of *force majeure.* (II App. pp. 22-23).

The ALJ concluded that Gulf failed to make a *prima facie* case and that therefore its showing was inadequate to reduce its refund obligation. In order to show an excuse to performance, Gulf catalogued on a daily basis the same types of mechanical breakdowns as *force majeure* events. The ALJ labeled Gulf's presentation as a "mechanical exercise in pigeonholing volumes of gas" and required Gulf, in addition to proving *force majeure* occurrences, to show how it had tried to overcome these occurrences. (II App. at 25). Gulf Oil appealed to the Commission for reconsideration of the ALJ's decision.

2. *Opinion No. 136.*

The Commission reversed the ALJ's decision in Opinion No. 136 which held that the volumes of gas Gulf attributed to *force majeure* were accurate and reasonable. The Commission defined *force majeure* as found in Article X of the contract. It also required Gulf to show that it used due diligence to produce the daily contract quantity of gas upon the occurrence of a *force majeure* event. (II App. p. 33)

The Commission imposed and found that Gulf satisfied a two-part burden of proof. The Commission required Gulf to identify the volumes which it had failed to deliver and then show that it used due diligence to make those deliveries. Relying upon prior Commission decisions and the Gulf-Texas Eastern contract, it required

that Gulf establish specifically "(1) the volumes demanded by Texas Eastern (2) the volumes Gulf delivered (3) the deficiency volumes and (4) the portion of the deficiency volumes not delivered by reason of *force majeure* as defined in the contract." (II App. p. 38). The Commission found that Gulf met its showing of due diligence to overcome *force majeure* events by producing those reports that it routinely prepared whenever a *force majeure* event occurred. The Commission found Gulf's evidence that the wells were in operation 98.9% of the time satisfied such a showing.

The Commission based its decision on the total number of volumes warranted over the life of the contract. It identified Gulf's "unconditional warranty" as the delivery of 4.4 Tcf of gas over the 26-year contract period. (II App. p. 36). Gulf's "obligation to deliver available volumes which could otherwise be delivered, but for a *force majeure* event [was] suspended during the period in which the *force majeure* occurred." *Id.* Consequently, this meant that Gulf's daily delivery obligation under the warranty was merely to attach fields capable under optimal conditions of producing 625 Mmcf daily; it also meant that Gulf need only deliver gas from the reserve fields to the extent that it was prevented by any specified *force majeure* event. *Id.* The Commission viewed the undelivered volumes as simply a loss of time, not of gas. It therefore found that Gulf's refund should be reduced by the full extent to the specified *force majeure* events.

The Commission required Gulf to show the quantity of undelivered gas and the type of *force majeure* event which contributed to the underdelivery. It did not require a showing of Gulf's source of supply; the gas fields Gulf ordinarily relied upon and its reserve fields. Neither did it require Gulf to show the steps that it had taken to overcome particular events labeled as *force majeure* that occurred regularly.

II

A. *The Standard of Review.*

This court initially reviews the Commission's order in light of the relevant facts to determine whether it either exceeds the Commission's authority or whether the Commission's order is an abuse of discretion. Section 19(A) of the Natural Gas Act of 1938, 15 U.S.C. § 717r (1970).[9] The court then examines each of the order's

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[9] The scope of the court's review, is explained in the Administrative Procedure Act, 5 U.S.C. § 706 (1970).

Section 706 provides:

> Scope of review
>
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, and abuse of discretion, or otherwise not in accord with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

elements to determine if it is supported by substantial evidence. *American Paper Institute v. Train*, 543 F.2d 328 (D.C.Cir. 1976), *cert. denied*, 429 U.S. 967 (1977). We find that the Commission's definition of *force majeure* and its application of that definition to the refund payment plan was in legal error. We find that because Gulf did not prove how it tried to overcome *force majeure* occurrences, the Commission's order is not supported by substantial evidence.

1. *The Definition of Force Majeure in a Warranty Contract.*

We must decide here how a party's daily delivery obligation is affected by its *force majeure* claims. To determine whether the Commission abused its discretion in reducing Gulf's refund payment to Texas Eastern by those volumes of gas attributable to *force majeure*, we must review the Commission's definition and its application of *force majeure* to the calculation of the recoupment under the refund plan. The Commission defined the contract term to allow *force majeure* as an excuse to a party's performance whenever an event can be classified as one of the twenty-six listed in Article X of the contract. We find the Commission's definition in legal error within the context of a warranty contract.

We were referred to no cases in which a *force majeure* clause was decided within a warranty contract context. However, it is well settled that a *force majeure* clause in a non-warranty contract defines the area of unforseeable events that might excuse nonperformance within the contract period. *United States v. Brooks Callaway Co.*, 318 U.S. 120, 123-24 (1943). Thus, to use the clause as an excuse to nonperformance, the event must have been beyond the party's control and without its fault or negligence. The nonperforming party has the burden of proof.

In *Brooks-Callaway*, a suit was brought by the nonperforming party to recover money deducted from the contract price as liquidated damages for delay in the completion of a contract for construction of levees on the Mississippi River. 318 U.S. at 121. The contract contained a *force majeure* clause which required that events delaying performance be "beyond the control and without the fault or negligence of the contractor." *Id.* at 120-21, n.1. The Supreme Court upheld a decision by the Court of Claims that the showing of the occurrence of an alleged *force majeure* event resulting in a delay in delivery did not constitute a *per se* claim to *force majeure* relief. To invoke *force majeure* and excuse performance, the nonperforming party's duty extends to showing what action it took to perform the contract regardless of the occurrence of the excuse. *Id.*

Within a warranty contract, a *force majeure* clause is appropriate; *Gulf Oil I*, 563 F.2d at 595; it excuses a party's nonperformance due to events outside of its control and without its fault or negligence. However its application differs from that of non-warranty ordinary contract. *Force majeure* events within a warranty contract can excuse the supplier's nonperformance for events beyond its control only to the extent that the supplier has shown that it had available resources to meet its warranty obligation. Thus, the supplier has the burden of proving that it had a quantity available greater than the maximum amount that could be demanded from it. When *force majeure* events affect the availability of both the regular source of supply as well as the reserve, and damage the system of delivery, the supplier's nonperformance is an excuse to delivery of the warranted amounts.

This court found in *Gulf Oil I* that the warranted daily quantity that Gulf was to deliver to Texas Eastern was a maximum of 625 Mmcf daily, unless Texas Eastern demanded less. *Gulf Oil I*, 563 F.2d at 602. The

Commission's error in defining the volumes of gas attributable to *force majeure* was in viewing Gulf's daily warranty delivery requirements as conditional on having gas available only from its regular source of supply. The Commission understood Gulf's duty as "connecting additional reserves as necessary to meet its total obligation." (II App. at 36). This indicates that the Commission viewed Gulf's overall obligation an unconditional: Gulf must deliver by the expiration of the contract term the total amount of gas warranted. The Commission viewed the daily deliveries as conditional on alleged *force majeure* events. It distinguished them from the overall deliveries because the delay was a temporary one. Therefore the Commission included in its definition of *force majeure* delays from temporary, yet anticipatory, events such as mechanical breakdowns or downtimes and maintenance repairs. These events were specified under the contract terms as *force majeure* events. However, the mere fact that the Commission did not require the parties to change the underlying contract does not mean that the contract terms are controlling. *Sun Oil Co. v. FPC*, 364 U.S. 170, 176 (1960); *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 157-8 (1960).

We find that the Commission's definition of *force majeure* is inconsistent with the underlying warranty. The warranty is to have a specific quantity of gas available daily from an unidentified source of supply. Article X becomes effective to excuse delay and the failure to meet the daily delivery obligations, if the delay caused by the listed events cannot be overcome from the regular or the reserve fields.

Our decision is based on the contract's daily warranty. The warranty provision in the Gulf-Texas Eastern contract is found in Article I, Paragraph 4. The contract terms require Gulf to have available a larger amount of gas than 625 Mmcf so that it can supply the maximum amount per day when demanded:

> 4. From and after the date of initial delivery of gas under this Agreement and throughout the remainder of the stated term thereof, Seller warrants and agrees that there will be provided under the terms and provisions of this Agreement *a quantity of gas sufficient to enable Seller to have available for delivery* hereunder on any day or days a volume not less than one hundred twenty-five per cent (125%) of the Daily Contract Quantity in effect from time to time under the provisions of Subparagraph 1(a) of Article II thereof.

Gulf Oil I, 563 F.2d at 613 (emphasis added). This obligation is separate and apart from Gulf's obligation over the contract period to deliver 4.4 Tcf of gas. The warranty clause in the contract supports the petitioners' claim that Gulf was warranting to have available reserves in excess of those capable of delivering 625 Mmcf of gas per day under optimum conditions. Gulf's intentions become clearer given its knowledge that all wells and equipment cannot operate consistently at maximum capability and the need for a significant amount of downtime for maintenance and repairs. Gulf does not allege that mechanical breakdowns and maintenance repairs are totally unforeseeable, but argues that the contract terms are to protect the parties from both foreseeable and unforeseeable events. (Answering Brief of Intervenor Gulf Oil in No. 82-3166, p. 30).

To support a definition of *force majeure* in a warranty contract, we must stress the element of uncertainty or lack of anticipation which surrounds the event's occurrence and must affect the availability and the delivery of gas. For example, the occurrence of a hurricane is a *force majeure* event. The resultant unavailability of gas follows from the occurrence of the event and carries with it the same amount of uncertainty. However, the effect of the event on the delivery of gas, the actual damage to the pipes, is not inferred from the event and thus does not

carry the presumption of uncertainty. It is incumbent on Gulf to establish that the pipe damage and mechanical breakdowns in issue would not have occurred if there had not been a hurricane. Pipe damage occurs because of normal wear and tear and therefore can be anticipated. If the *force majeure* event causes the inability to deliver the gas rather than the inability to obtain the gas, the supplying party has the burden of proving that the inability to deliver was not caused by routine maintenance.

Furthermore, it is possible to accurately describe an event at its initial occurrence as unforeseeable and later because of the regularity with which it occurs, to find that such a description is no longer applicable. Even presuming that Gulf's routine mechanical repairs were within the ambit of the force *majeure* clause, their frequent, almost predictable, occurrence takes them outside of a *force majeure* excuse to nonperformance. The element of uncertainty that defines unforseeability is negated by the regularity with which the events occurred. It is not enough for Gulf to allege that because the mechanical repairs were listed in the contract, they were *force majeure* events. Nor is it enough for Gulf to defend the inclusion of such repairs in the contract clause because it is unable to determine the volumes of gas which might be lost under such circumstances.

Finding support in the *Brooks-Calloway* rationale, we conclude that in order to invoke the use of *force majeure* as an excuse under the warranty contract, Gulf as the nonperforming party must show that even though the events which delayed its performance were unforeseeable and infrequent that it had available at the time of their occurrence more than the maximum warranted quantity of gas. This means that it must show that the availability of the gas as well as its delivery of it was affected by the occurrence of a *force majeure* event. Thus, we find that the Commission's definition and application of *force majeure* resulted in legal error. We therefore find

that the refund calculations based on these volumes inaccurate.

2. *The Due Diligence Showing.*

We must also review the findings of fact underlying the Commission's order to determine if they are supported by substantial evidence. We find that the Commission's decision was not based on a consideration of all the relevant factors. Specifically, we conclude that in order to use *force majeure* events to excuse nonperformance, Gulf must show that it tried to overcome the results of the events' occurrences by doing everything within its control to prevent or to minimize the event's occurrence and its effects.

Article X of the contract requires a showing of due diligence to overcome the event upon the occurrence of a *force majeure* event. The Commission found Gulf's regular reporting of *force majeure* events as listed in the contract categories sufficient to meet this standard. The Commission's finding that Gulf exercised due diligence to overcome the events does not detail the nature of that showing. The Commission accepted Gulf's testimony that it had undertaken the steps of a prudent pipeline producer to initiate or prevent the occurrence of the various *force majeure* events. The Commission also accepted as a showing of due diligence Gulf's careful and prompt categorizing of claimed *force majeure* events and the amount of gas lost from each of them. Gulf even demonstrated various ways in which it maximized deliveries from inadequate supplies thus minimizing alleged *force majeure* events. (II App. p. 38). The Commission looked favorably upon Gulf's preventive maintenance, its minimizing of downtimes, the nearly perfect percentage of times at which its wells and compressors operated, and its deferral of maintenance procedures so as not to hinder production. (II App. pp. 38-39). Although such showings are perhaps indicative of

the occurrence of some *force majeure* events and of skillful management of the supply of gas, they do not meet the requisite burden of proof to excuse performance and thus satisfy a *force majeure* defense to delivery. *Brooks v. Calloway*, 318 U.S. at 123; *Jennie-O Foods Inc. v. United States*, 580 F.2d 400, 408, (Ct.Cl. 1978).

The Commission distinguished the burden of proof imposed by the court in *Jennie-O* from this case because in *Jennie-O*, the contracting parties sought a permanent excuse from performance rather than temporary suspension. The Commission's reasoning was based on Gulf's warranty obligation over the life of the contract. (II App. 35, n.17). We find such a distinction unnecessary, especially given our earlier discussion of the divisibility of the daily quantity requirement from the total quantity requirement. The parties in *Jennie-O*, similar to the parties here, were seeking to reduce liquidated damages required in the event of delay. The liquidated damages are similar to the monetary damages under the refund plan because they tend to compensate the party who was not at fault in causing the delay.

For *force majeure* events to excuse nonperformance, some correlation must be drawn between the occurrence of an event and the obligation of the nonperforming party. *Brooks-Calloway*, 313 U.S. at 123; *Jenine-O*, 580 F.2d at 400. We think that Gulf must show that it exercised due diligence to overcome the effects of the specific *force majeure* events. Gulf must show that it tried to limit the problem and was not able and that it did everything in its control to prevent or minimize its happening. Gulf must show that its source of supply was either unavailable or undeliverable due to *force majeure* occurrences. To show that its source of supply was unavailable or undeliverable, Gulf must prove that despite its efforts, it was not able to produce its maximum daily contract warranty of 625 Mmcf from either its regular or its reserve sources.

Gulf's nonperformance will be excused because of *force majeure* events that affect either its source of supply or its ability to deliver gas. To defend nonperformance due to the supply of gas, Gulf must show a correlation between a deficiency in supply and overcoming that deficiency. Specifically, Gulf must identify each of its fields, those which it relies upon for the regular sources of supply and those for the reserve; it must demonstrate the amount of gas that each field is capable of producing on a daily basis; it must identify which fields the *force majeure* events affected and show the amount of gas that each field produced on the day that the *force majeure* event occurred. Then, Gulf would have determined the number of deficit volumes from unavailable sources of supply due to *force majeure* events.

To defend nonperformance due to mechanical breakdowns, Gulf must show that although the gas was available, the *force majeure* event caused its inability to deliver the gas. It has the burden of proving that the accidents, alterations, repairs or failure of production facilities were a result of a *force majeure* event. It must show the notice of the breakdown that it gave; the daily quantity of gas that is produced through the damaged pipe or pipes; the amount of time that the repair took; and the number of volumes undelivered due to that repair. The mere fact that a routine repair occurred unexpectedly will not constitute a claim of undelivery due to *force majeure* events. Gulf must prove the number of deficit volumes undelivered due to a *force majeure* event that caused the mechanical breakdown.

The contract term requiring a showing of due diligence should be interpreted to require Gulf to act expeditiously and efficiently in cataloging those volumes of gas attributable to *force majeure* events. This standard does not mean that Gulf is excused from proving how it tried to overcome the effects of a force majeure event.

Examining those volumes attributable to *force majeure* events that Gulf presented, we agree with the ALJ that,

with the exception of the category listed "storms," the contract categories are obscure. Storms qualify as a *force majeure* event because they are unexpected, and out of the party's control. (II App. p. 21). The occurrence of such events and nonperformance due to the unavailability or undeliverability of supply is plausible. A showing of the occurrence of those events on a specific date, and an identification of the fields affected, will constitute some evidence for a defense. Nevertheless, the nonperforming party must still prove how it tried to overcome the event and its effects. The connection between the other listed categories and *force majeure* events is too tenuous to make the clause effective without a stronger connection between the event and the nonperformance due to its occurrence. Because Gulf's evidence does not prove how it tried to overcome the results of *force majeure* events, we find that the Commission's order on the *force majeure* issue was not supported by substantial evidence and therefore must be reversed.

III. CONCLUSION

Based on the foregoing we find that the Commission's order in Opinion No. 136 reducing Gulf's refunds to Texas Eastern by the volumes of gas attributable to *force majeure* was in error. We will therefore reverse the Commission's order on the *force majeure* issue and remand that case to the Commission for a determination of the appropriate number of volumes attributable to *force majeure* in a way that is consistent with this opinion.[10] We will affirm the other orders of the Commission.[11]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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[10] Nos. 82-3166/67.

[11] Nos. 82-3035, 82-3132, 82-3137, and 82-3242.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 82-3035, 82-3132, 82-3137, 82-3166/67 and 82-3242

GULF OIL CORPORATION,
Petitioner in No. 82-3035

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PHILADELPHIA GAS WORKS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PUBLIC SERVICE ELECTRIC AND GAS COMPANY, NEW JERSEY NATURAL GAS COMPANY, WASHINGTON URBAN LEAGUE, THE BROOKLYN UNION GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors

GULF OIL CORPORATION,
Petitioner in No. 82-3132

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PHILADELPHIA GAS WORKS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, WASHINGTON URBAN LEAGUE, and TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors

WASHINGTON URBAN LEAGUE,
Petitioner in No. 82-3137

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PHILADELPHIA GAS WORKS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION, and GULF OIL CORPORATION,
Intervenors

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner in No. 82-3166

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

GULF OIL CORPORATION, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors

THE BROOKLYN UNION GAS COMPANY,
Intervenor

PHILADELPHIA GAS WORKS,
Petitioner in No. 82-3167

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

GULF OIL CORPORATION, TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors

THE BROOKLYN UNION GAS COMPANY,
Intervenor

GULF OIL CORPORATION,
Petitioner in No. 82-3242

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors

WASHINGTON URBAN LEAGUE,
Intervenor

PETITION FOR REVIEW
FEDERAL ENERGY REGULATORY COMMISSION
(CI64-26)

Argued January 7, 1983

Before: ALDISERT, GIBBONS and HIGGINBOTHAM,
Circuit Judges

(Opinion filed April 21, 1983)

ORDER AMENDING OPINION

IT IS ORDERED that the slip opinion in the above matter is hereby amended as follows:

1. On p. 8, footnote 3, line 17, should be amended as follows:

> "In No. 82-3137, the Washington Urban League is the petitioner, challenging the December 18, 1981 Order of the FERC."

2. On p. 8, footnote 4, line 1, should be amended as follows:

> "In Docket Nos. 82-3166, 82-3167, and 82-3137, the petitioners" . . .

3. On p. 8, footnote 4, at the conclusion of the note, the following sentence should be added:

"In 82-3137, the WUL also challenges the FERC Order of January 22, 1982."

4. On p. 9, line 10 should be amended as follows:

"Philadelphia Gas Works ("PGW") and the Washington Urban League ("WUL") oppose the Commission's order.

5. On p. 9, line 13, substitute "WUL" for "Washington Urban League ("WUL")."

6. On p. 26, the following sentence should be added to the end of the last paragraph:

"Costs taxed against petitioner in Nos. 82-3035, 82-3242, 82-3132. Costs taxed against respondent in C.A. Nos. 82-3166 and 82-3167. On 82-3137, each party to bear its own costs."

7. On p. 26, footnote 10, at the conclusion of the footnote insert:

"No. 82-3137 is reversed *in part*."

8. On p. 26, footnote 11, following 82-3137 insert the phrase "*in part*,"

BY THE COURT:

A. LEON HIGGINBOTHAM, JR.
Circuit Judge

DATED: June 15, 1983

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 136

Docket No. CI64-26)
(Force Majeure)

GULF OIL CORPORATION

OPINION AND ORDER REVERSING
INITIAL DECISION

Issued: January 22, 1982

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 136

Docket No. CI64-26
(Force Majeure)

GULF OIL CORPORATION

OPINION AND ORDER REVERSING
INITIAL DECISION

APPEARANCES

Carroll L. Gilliam, Craig W. Hulvey, A. Paul Brandimarte, Jr., Lauren Eaton and *Warren M. Sparks* for Gulf Oil Corporation

James W. McCartney and *Judy M. Johnson* for Texas Eastern Transmission Corporation

Morton L. Simons for the Washington Urban League

Michael W. Hall, Joseph P. Stevens and *Barbara M. Gunther* for the Brooklyn Union Gas Company

Joseph R. Davison and *Thomas R. Hendershot* for Philadelphia Gas Works

Peter H. Schiff, Richard A. Solomon and *Dennis Lane* for the Public Service Commission of the State of New York

F. Joseph Gentili for the State Commissions of Connecticut, Massachusetts and Rhode Island

Joseph M. Oliver, Jr. and *Frederick Warren* for the New Jersey Natural Gas Company

John W. Glendening, Jr. and *John A. Schmidt* for the Boston Gas Company

John T. Miller, Jr. and *Russell Fleming, Jr.* for Elizabethtown Gas Company

William R. Hoatson for the Public Service Electric and Gas Company

Edgar K. Parks and *J. Carmen Gastilo* for the Federal Enegry Regulatory Commission

PRODUCER CERTIFICATE
WARRANTY CONTRACT
FORCE MAJEURE

UNITED STATES OF AMERICA
FEDRAL ENERGY REGULATORY COMMISSION

Before Commissioners: C. M. Butler III, Chairman;
Georgiana Sheldon,
J. David Hughes and
A. G. Sousa.

Docket No. CI64-26
(Force Majeure)

GULF OIL CORPORATION

OPINION NO. 136

OPINION AND ORDER REVERSING
INITIAL DECISION

(Issued January 22, 1982)

Gulf Oil Corporation (Gulf) has failed to deliver to Texas Eastern Transmission Corporation (Texas Eastern) the amounts of gas required by its certificate of public convenience and necessity and the underlying warranty contract. In *Gulf Oil Corporation*, Opinion No. 780, issued October 15, 1976,[1] the Federal Power Commission (FPC) imposed a refund remedy on Gulf based on the underdeliveries "excepting volumes attributable to *force majeure*."[2] This proceeding concerns the determination of the accuracy and reasonableness of the volumes which Gulf claims it had available but was "rendered unable, wholly or in part," by reason of *force*

[1] 56 FPC 2293.

[2] Ordering paragraph (B), 56 FPC 2307.

majeure to deliver to Texas Eastern. A hearing was held on this issue, and, following the close of Gulf's presentation of evidence, the Washington Urban League (Urban League) moved to strike Gulf's presentation as insufficient as a matter of law. The presiding judge treated the motion to strike as a motion for summary judgment, and granted the motion for summary judgment in an initial decision issued on June 23, 1980. Gulf filed a brief on exceptions. Briefs opposing exceptions were filed by Urban League, the Public Service Commission of the State of New York (New York), and the Commission staff. For the reasons set forth below, we find that the judge's decision is erroneous and must be reversed.

GULF'S CERTIFICATE OBLIGATIONS

Gulf's certificate was based on a precedent agreement dated March 28, 1963, and a gas purchase contract executed by the parties on January 6, 1964. Under the terms of the contract, designated FPC Gas Rate Schedule No. 278, Gulf would have available for delivery to Texas Eastern certain daily quantities for 26 years from the date of initial delivery, or until 4.437675 trillion cubic feet of gas had been delivered, whichever first occured. No specific leases or reserves were dedicated to the performance of the contract, but it was expected that the bulk of the gas would be produced from the West Delta Block 27 Field, Plaquemines Parish, Louisiana.[3]

The Daily Contract Quantity was 500 million cubic feet, with Texas Eastern having the right to call for a maximum of 625 million cubic feet per day. The price at 100 percent annual load factor was 19¢ per Mcf for ten years after first delivery, 21¢ for the next ten years,

[3] Findings and Order Issuing Certificate of Public Convenience and Necessity and Permitting Abandonment, issued December 19, 1963, in *Texas Eastern Transmission Corporation*, Docket No. CP64-5, *et al.*, 30 FPC 1559.

and 22¢ thereafter. Deliveries to Texas Eastern commenced on November 1, 1964.

Article X of the gas purchase contract provides that the obligations of either party shall be suspended to the extent it was unable "wholly or in part" to perform by reason of *force majeure*. The article then defined the acts and occurrences constituting *force majeure* for purposes of the contract.

The West Delta Block 27 reserves were not as great as expected, and Gulf did not have available through its own efforts the volumes required by the contract. In order to meet its contractual obligations, Gulf began purchasing gas from other producers in the area. On August 24, 1971, Gulf filed an application to amend the certificate to allow it to pass through to Texas Eastern the higher price per Mcf it paid other producers for gas it purchased from them for delivery to Texas Eastern, and to allow Gulf to receive a higher price for gas delivered from leases connected after July 1, 1971. In Opinion Nos. 692, (51 FPC 1340) and 692-A, (52 FPC 593), the FPC rejected Gulf's proposed amendments to its certificate, stating, "we think Gulf's contractual warranty to be unconditional, and we are firmly convinced that its certificate obligations are unconditional." (51 FPC 1351). The FPC then held Gulf to performance of its obligations under the 1963 certificate of public convenience and necessity. (51 FPC 1354). No judicial review was sought of Opinion Nos. 692 and 692-A.

Texas Eastern consistently demanded 625 MMcf per day except in circumstances when it could not absorb this amount because of system supply, storage inventories, or repairs, and it developed that Gulf was unable to fulfill this maximum contract quantity. On November 7, 1975, the FPC issued a show cause order stating that Gulf's failure to live up to its warranty obligations with the concomitant reduction in service to Texas Eastern's customers should be examined (54 FPC 2031). Texas

Eastern was made a respondent and directed it to show cause why it should not be required to pursue all administrative and judicial remedies available to it with respect to Gulf's failure to meet its delivery obligations under the warranty contract and the certificate issued to Gulf. The outgrowth of the show cause order and the subsequent hearing and initial decision was Opinion No. 780, issued October 15, 1976,[4] and Opinion No. 780-A, issued December 9, 1976.[5]

In those opinions, the FPC found that Gulf had failed to carry out its obligations under the contract of January 6, 1964, and its certificate of public convenience and necessity issued December 19, 1963. The FPC held that Gulf was obligated to deliver 625 MMcf per day, subject to a lesser request from Texas Eastern and the *force majeure* provisions, to the extent they apply, and provided for a refund remedy requiring Gulf to compute and pay refunds to Texas Eastern in accordance therewith. The refunds would be measured by the difference between Texas Eastern's requests for gas (subject to the contract maximum of 625 MMcf per day) and Gulf's deliveries, excepting volumes attributable to *force majeure*, times the difference between the contract price and the area or national rate applicable to new gas purchases at the time of underdelivery. Damages would be assessed for each month deliveries fell below the amount demanded by Texas Eastern, if within the contract maximum, excepting volumes attributable to *force majeure*.[6] The refunds would in turn be flowed through to Texas Eastern's jurisdictional customers. Since, however, delivery of 4.4 Tcf at the contract price *and* payment of refunds would mean that Gulf was not receiving the compensation to which it was entitled, the FPC provided that when Gulf had delivered an amount of gas equiva-

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[4] 56 FPC 2293.

[5] 56 FPC 3492.

[6] Opinion No. 780, ordering paragraph (B), 56 FPC 2307.

lent to the contract amount less the amounts of gas for which it had paid refunds, Gulf would be permitted to charge the contract price plus the amount of the refunds previously paid on an equivalent amount of gas.[7]

Upon judicial review, Opinion Nos. 780 and 780-A were affirmed. *Gulf Oil Corporation* v. *F.P.C.*, 563 F.2d 588 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978), *rehearing denied*, 435 U.S. 981 (1978).

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[7] The FPC used the following hypothetical example (Opinion No. 780, mimeo, page 10) to clarify the refund-recoupment formula. Assume that Gulf had defaulted in the following amounts:

1/1/74 - 6/21/74	90 Bcf at 7 cents [26 cents-19 cents]/Mcf = $6.3 million
6/21/74 - 12/4/74	40 Bcf at 23 cents [42 cents-19 cents]/Mcf = $9.2 million
12/5/74 - 7/26/76	150 Bcf at 33 cents [52 cents-19 cents]/Mcf = $49.5 million
7/27/76 - 12/1/76	20 Bcf at $1.23 [$1.42-19 cents]/Mcf = $24.6 million

Then Gulf would be required to refund immediately, plus appropriate interest, $89.6 million. Then, when it had delivered all but 300 Bcf of the contract amount, it would be permitted to recoup its refunds by adding a surcharge of 7 cents/Mcf to the next 90 Bcf sold, 23 cents/Mcf to the next 40 Bcf, etc., until the entire contract was fulfilled, and the entire refund recouped.

Over the entire contract, Gulf would have received exactly the contract price for all 4.4 Tcf, but it would, in effect have been required to lose the time value of its money required to compensate its customers for their losses due to Gulf's non-delivery in accordance with the terms of the contract.

The formula was modified in Opinion No. 780-A to permit Gulf to recoup refunds as part of the sale of volumes in excess of 625 MMcf per day. Whenever Gulf delivers, and Texas Eastern agrees to take, amounts over 625 MMcf per day, the excess shall reduce any cumulative deficiency of Gulf's performance. Such excess may be sold at a price per Mcf equal to the then applicable contract price, plus an amount equal to the refund Gulf has paid on an equivalent volume of gas. The vintage of gas whose refund shall be recouped shall be as agreed by Gulf and Texas Eastern. (Mimeo, page 9).

THE INSTANT PROCEEDING

By order issued Jauary 17, 1979, this Commission set the *force majeure* issue for hearing to determine whether the claimed *force majeure* volumes were accurate and reasonable and should be allowed to reduce the refund obligation. At that time, Gulf's deficiencies in deliveries to Texas Eastern totalled approximately 307.2 Bcf, of which some 84.4 Bcf were claimed as *force majeure* volumes.

At the hearing held September 11 and 12, 1979, Gulf presented its evidence, including exhibits which listed by date the *force majeure* events, the facilities and locations and the well numbers for each such event, the *force majeure* volume in Mcf, and the back-up documents (generally contemporaneously kept records of downtime incidents and lost volumes) substantiating the *force majeure* claims. At the conclusion of cross-examination of Gulf's expert witness, Urban League moved to strike Gulf's evidentiary presentation. The presiding judge directed that briefs be submitted with respect to Urban League's motion.

In his initial decision, the presiding judge construed Urban League's motion to strike Gulf's evidentiary presentation as a motion for summary judgment and proceeded to reach a determination on the merits of the case. The judge first addressed the interpretation and effect to be given the *force majeure* provision of the Gulf-Texas Eastern contract. He held that no explanation was given by the FPC as to what the term "*force majeure*" meant, and stated that the *force majeure* concept was injected into the refund formula without findings or discussion by the FPC in Opinion No. 780 (I.D., p. 6). Although the judge suggested that the *force majeure* concept in the contract was inconsistent with Gulf's warranty and certificate obligations, he nevertheless recognized that "this phase of the proceeding is not being written on an altogether clean slate . . . it is too late to argue now that *force majeure*

has no place in a warranty setting."[8] He did not, however, proceed to rule on the interpretation of the provision. Instead, he held that Gulf had not met its burden of proof under any interpretation of *force majeure* (I.D., pp. 10, 11), and therefore denied Gulf any reduction in its refund obligation due to the claimed *force majeure*.

Gulf, in its brief on exceptions, argues that the presiding judge failed to give proper effect to the gas sales contract, including the *force majeure* provision. Gulf argues that the judge incorrectly determined what constitutes Gulf's prima facie case. Gulf contends that the judge misinterpreted prior Commission opinions in concluding that Gulf must meet a heavy burden of proof. If the proper evidentiary standard had been applied, Gulf argues, then its evidence constituted an unrebutted prima case meeting its burden of proof. Therefore, Gulf argues that it is entitled to a reduction in its refund obligations based on the *force majeure* volumes. We agree with Gulf.

DECISION

At the outset we must note that the issue here is not whether the *force majeure* provision of the warranty contract excuses Gulf's performance. Rather, the issue is whether Gulf should be required to refund, subject to a recoupment mechanism, money attributable to gas Gulf would have delivered to Texas Eastern except for *force majeure*. Thus, we must determine what *force majeure* means in the context of the refund-recoupment remedy and what Gulf must show to meet its burden of proof.

Interpretation of force majeure. The presiding judge did not rule on the interpretation of the *force majeure* provision. He did hold that no explanation was given by the FPC as to what the term "*force majeure*" meant, and stated that the *force majeure* concept was injected into the refund formula without findings or discussion by the FPC in Opinion No. 780. Upon review of the

[8] Initial decision, p. 10.

prior opinions concerning the Gulf warranty contract, we note there had been some, albeit limited, discussion of the *force majeure* provision prior to this phase of the proceeding.

In Opinion No. 780, Gulf argued that the failure of the Department of the Interior to hold regular general offshore Louisiana lease sales and the excessive cost of gas purchased by Gulf for delivery to Texas Eastern constituted *force majeure*. The FPC looked to Article X of the gas purchase contract, which expressly defines *force majeure*, and found neither the absence of lease sales nor the price factor constituted *force majeure* and, thereforce, did not relieve Gulf of its delivery obligations.[9]

On rehearing, the FPC again rejected Gulf's contention that the failure of the Department of the Interior to hold regular offshore lease sales was an act of *force majeure*. The FPC went on to state that it assumed that Gulf's Exhibit SC-3, which summarized the volumes delivered and the *force majeure* volumes on an average daily basis, contained "no component attributable to Interior Department leasing policies. If, however, any of these alleged volumes are so attributable, they should be eliminated in computing the refund set forth in paragraph (B) of Opinion No. 780. When such filing is made, other parties are, of course, free to make comments as to its accuracy and *adherence to the contract* and to the Commission order." [10] (Emphasis added). Thus, in Opinion No. 780-A, the FPC, implicitly if not explicitly, indicated that *force majeure*, for purposes of the refund formula, should be defined in accordance with Article X of the contract. We agree.

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[9] 56 FPC 2304. This approach was affirmed by the Court of Appeals for the Third Circuit in its review of Opinion No. 780. 563 F.2d 601.

[10] 56 FPC 3505.

Assuming, *arguendo*, that the interpretation of the *force majeure* provision remains an open question, we reject the arguments of certain intervenors that this Commission should now construe the *force majeure* provision according to common usage or a common law definition rather than the specific definition set forth in the contract. Under this approach, *force majeure* would be limited to events such as natural disasters and would not include a number of occurrences specified in Article X of the contract, such as breakage of pipes. Such an approach would be inconsistent with the prior history of this controversy.

The gas purchase contract, including Article X, was submitted with Gulf's certificate application in 1963. The certificate was issued December 19, 1963, and Gulf and Texas Eastern executed the contract January 6, 1964. The contract, including the *force majeure* provision, was accepted for filing by the FPC and remains effective as Gulf's FERC Gas Rate Schedule No. 278. The *force majeure* provision, including its broad definition of the term, was a bargained-for part of the gas sales contract. As such, it is an integral part of the contract defining the rights and responsibilities of the parties.

Yet the intervenors, who at no time prior to the instant proceeding raised any objection to the provision, now propose that the contract be abrogated by substituting a standard entirely different from that set forth in the contract. While we do have authority to disregard contract terms which are contrary to public policy in issuing certificates,[11] we do not believe that is the case

[11] The regulatory system created by the Natural Gas Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity. *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968). See also *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Thus, the FPC, in Opinion No. 780, refused to adopt the arbitration pro-

here. This was recognized by the FPC in ordering paragraph (B) of Opinion No. 780, when it specifically excluded volumes attributable to *force majeure* from the undelivered volumes upon which Gulf must pay a refund,[12] and again in Opinion No. 780-A, when the FPC stated, "it is the Commission's holding that Gulf is obligated to deliver 625 MMcf per day, subject to a lesser request from Texas Eastern and the *force majeure* provisions, to the extent *they* apply." (emphasis added)[13] Thus, we find that, for the purposes of the certificates in question and the refund formula, *force majeure* has and should mean *force majeure* as defined in Article X of the contract.

Burden of Proof. The next question is whether Gulf carried its burden of proof, for purposes of the refund remedy, when it showed that certain enumerated *force majeure* events prevented delivery of specific amounts of natural gas to Texas Eastern. To answer this question one must look to the purpose of the refund mechanism.

The refund mechanism was not "intended as a measure of damages but as a method of enforcing compliance with [Gulf's] certificate [.]" [14] With this purpose in mind the FPC required Gulf to make refunds for all underdeliveries excepting volumes attributable to *force majeure.*[15] Thus, Gulf is obligated to make refunds on all underdeliveries unless all or part of the underdelivery is excused by a *force majeure* event. Stated differently we

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visions of the Gulf-Texas Eastern contract. The provision was inconsistent with the FPC's duty tions under the certificate were within the FPC's exclusive jurisdiction. There is no similar "circumstance of unequivocal public necessity" concerning the *force majeure* provision which would justify abrogation of that part of the contract.

[12] 56 FPC 2307.

[13] 56 FPC 3495.

[14] *Gulf Oil Corp.* v. *FPC, supra,* 563 .2d at 608.

[15] 56 F.P.C. 2307.

hold that Gulf must show that a *force majeure* event occurred and that volumes of natural gas "attributable" to that event would, except for *force majeure*, have been delivered to Texas Eastern. As discussed below Gulf has done so.

The presiding judge held that Gulf must meet a "heavy" burden of proof. This conclusion was based on what the judge described as Gulf's "*unconditional daily delivery obligations.*" [16] He also quoted that portion of Article X which states, "rendered unable, wholly or in part, by *force majeure* to carry out its obligations under this agreement." The presiding judge cited no statute, regulation, prior Commission order, or court decision in support of the evidentiary standard imposed in the initial decision. Furthermore, the *force majeure* volumes are not forgiven or permanently excused from delivery. They merely reduce the refund obligation to the extent *force majeure* delayed delivery.

In our opinion, there is nothing in the nature of this proceeding, involving the refund formula, which requires as a matter of law or equity any departure from the normal standard of burden of proof applicable to Commission proceedings. Contrary to the judge's determination, we see nothing about this particular case which would indicate that a special or "heavy" burden of proof should be imposed. Gulf is obliged to justify its claims by means of reliable, probative, and substantial evidence meeting the requirements of law. It is not obliged to do more.[17]

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[16] We note that the delivery obligation is not unconditional but is explicitly conditioned by the *force majeure* clause.

[17] We also reject the assertion required of New York that a heavy burden of proof in this proceeding is governed by some sort of "equitable principle". In support of its assertion, New York cites *Chemetron Corporation* v. *McLouth Steel Corporation*, 381 F.Supp. 245 (N.D. Ill. 1974) and *Jennie-O Foods, Inc.* v. *United States*, 580 F.2d 400 (Ct. Cl. 1978). In our opinion, both cases are readily distinguished from this proceeding, not only because the contracting

In his decision, the judge went on to find that Gulf "was obliged in this phase of the proceeding to establish a causal connection between alleged *force majeure* occurrences and its failure to deliver the volumes of gas demanded by Texas Eastern, [and that] [t]his it had] not done." The judge held that Gulf's *prima facie* case should have included the following: (1) disclosure of the gas fields which it ordinarily depends upon to supply Texas Eastern under the warranty contract, (2) a quantification of how much gas was available on a daily basis from each of these fields—the minimum, maximum, and average volumes, (3) establishing that *force majeure* events precluded Gulf from fulfilling its delivery obligations from these fields, and (4) that it was unable to makeup the deficiency from other gas sources. The judge then held that Gulf's evidence did nothing more than indicate by dates the volumes of gas not delivered from particular fields and classify those volumes under the terms and phrases listed in Article X of the contract. He further held that Gulf was obligated to show in this proceeding the steps it had taken to prevent or overcome the *force majeure* occurrences and how, despite its efforts, particular occurrences had stopped it from fulfilling its daily warranty obligations.

With regard to the first element of the standard set forth in the initial decision, that Gulf disclose the gas fields upon which it ordinarily depends for its sources of supply, we note that the FPC, in its December 19, 1963 order, required Gulf to notify the FPC of each new source of supply used to fulfill the Texas Eastern sales contract (30 FPC 1560). There has been no suggestion that Gulf has not complied with that condition. Moreover, the iden-

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parties sought permanent excuse from performance of their respective contractual obligations, rather than temporary suspension of an obligation which ultimately must be performed, but also because the languages of the *force majeure* provisions differ materially from Article X.

tity of the gas fields may also be found in Exhibit FM-25. The second element of the standard would require Gulf to quantify how much gas was available on a daily basis from each of the fields used to supply gas for the contract—the minimum, the maximum, and the average volumes. We perceive no relevance between the minimum, maximum, and average volumes of gas available from a field and establishing that an act of *force majeure* occurred which prevented delivery of a stated quantity of gas from that field to Texas Eastern.

The third element of the judge's standard requires Gulf to establish that the *force majeure* events precluded Gulf from fulfilling its delivery obligations from these fields, and the fourth element of the judge's standard was that Gulf must prove that its was unable to make up the deficiency arising from the *force majeure* events from other sources. The judge imposed these requirements because he apparently felt that the *force majeure*, in terms of the refund remedy, could not become operable unless Gulf were willing and able, but for the *force majeure* event, to deliver the required contract volume. This would render the *force majeure* inoperative in any case where, absent *force majeure*, Gulf was delivering less volume than required by the contract (*i.e.*, 625 MMcf per day). We reject this theory since it is not supported by the provisions of the parties' governing contract or the prior opinions and orders concerning the refund remedy.

The unconditional warranty given by Gulf requires it to ultimately deliver 4.4 trillion cubic feet of gas, and the warrantly obligates Gulf to connect additional fields as necessary to fulfill the contract or else be found in violation of its certificate, as it was in Opinion No. 780. Gulf's *daily* contractual obligation is to have available for delivery to Texas Eastern 625 MMcf of gas. The *force majeure* provision is concerned with failure, in whole or in part, to deliver otherwise available volumes from fields in use in fulfilling the contract. The obligation to deliver

available volumes which could otherwise be delivered, but for a *force majeure* event, is suspended during the period during which the *force majeure* event occurred. The *force majeure* volumes are not a part of, or related to, the non-delivery of other volumes outside the force majeure provision as to which the Commission fashioned the refund remedy, and the provision does not in any way reduce Gulf's ultimate delivery obligation of 4.4 trillion cubic feet of gas.

This interpretation is consistent with the provisions of Article X of the contract which defines specific *force majeure* events but excludes failure of gas supply. Under the judge's definition of *force majeure* the exception, failure of supply, would swallow the enumerated *force majeure* events and leave the remainder of the provision inoperative if supplies could otherwise have been obtained anywhere in the world. We think the better interputation is to give meaning to both parts of the *force majeure* definition as we do here, *i.e.*, by reducing the refund remedy to the extent *force majeure* events caused underdelivery but not excusing failure of supply.

This approach was recognized in Opinion No. 780, ordering paragraph (B), which states, "Damages would be assessed for each month deliveries fell below the amount demanded by Texas Eastern, if within the contract maximum, excepting volumes attributable to *force majeure*." 56 FPC 2307. In Opinion No. 780-A, the FPC commented upon Gulf's Exhibit SC-3, which summarized the volumes delivered and the *force majeure* volumes on an average daily basis, as follows: "It is apparent from these figures that Gulf has computed *force majeure* on a basis other than a blanket excuse for its failure to deliver. . ." 56 FPC 3505. Thus, the refund-recoupment formula was prescribed by the FPC with the knowledge that Gulf was delivering less gas than required under the contract, even if there had been no *force majeure* events, and that formula specifically excluded the *force majeure* volumes from

the amount of refund which Gulf must pay. We conclude that the judge's holding that Gulf was entitled to reduce its refund obligation by reason of *force majeure* only in instances where Gulf otherwise would have supplied the total daily quantity demanded by Texas Eastern is contrary to the prior Commission opinions in this matter.[18]

In conclusion, we disagree with the judge's holdings regarding Gulf's prima facie case. We hold that the relevant facts in this case, as required by previous Commission decisions and the Gulf-Texas Eastern contract, are (1) the volumes demanded by Texas Eastern (2) the volumes Gulf delivered (3) the deficiency volumes, and (4) the portion of the deficiency volumes not delivered by reason of *force majeure* as defined in the contract. We further hold that the nexus required between each claim and the failure to deliver the demanded quantity of gas is that the *force majeure* event prevented delivery, in whole or in part, of gas that would otherwise have been delivered to Texas Eastern, and that Gulf must demonstrate that due diligence was exercised as required by Article X. Gulf had done so.

Gulf's evidence presented at the hearing included the procedure by which *force majeure* volumes were reported and compiled, each event qualifying as *force majeure*, and the details of Gulf's internal audit of underlying background documents.[19] For each *force majeure* event,

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[18] We note that in Opinion No. 780, the FPC was aware that Gulf had made a number of intrastate sales during the period in which it was delivering less than the demanded quantity of gas to Texas Eastern. Accordingly, the FPC required Gulf to file all contracts for the sale of gas in intrastate commerce made after the date of the opinion. 56 FPC 2299-2300. The FPC did not, however, suggest that the gas sold in intrastate commerce either could have or should have been delivered to Texas Eastern in order for *force majeure* to apply.

[19] Transcript pages 83-101 and 121-125; Exhibits FM-25, FM-26, and FM-27.

Gulf's exhibits listed the well number, facility and location, code numbers indicating the type of event and the relevant clause of Article X, the *force majeure* volume in Mcf, and the back-up documents. Those documents, chiefly reports, were prepared contemporaneously in the normal course of business.[20] Other data included the fields connected as sources of supply for the Texas Eastern contract, the percent of a field's production delivered to Texas Eastern, the gas-oil ratio in Mcf and barrels, and the monthly production in Mcf and barrels.

Gulf also introduced evidence on the due diligence issue. Gulf's witness testified that its wells were in operation 98.9 percent of the time during the period in question (Tr. 172), and that the compressors operated 98 percent of the time (Tr. 360). He also testified that whenever possible, Gulf deferred maintenance until it could be accomplished without loss of production (Tr. 266), such as performing maintenance during shutdowns resulting from other causes, *e.g.*, a shutdown of Texas Eastern's line (Tr. 327-328). He further testified that approximately 50 percent of the gas delivered to Texas Eastern is casinghead gas, and thus *force majeure* often results in loss of both gas and oil revenue (Tr. 359).

Gulf's witness testified that gas deliveries are dependent on equipment which does not and cannot operate perfectly 100 percent of the time. To overcome these limitations, Gulf has utilized a predictive maintenance technique (Tr. 360-361). This technique relies on continuous surveillance and monitoring of equipment for changes in vital signs (Tr. 324). Gulf considers the technique, which is generally accepted in the industry (Tr. 261 and 355), to be the best procedure available (Tr. 358) and more effective for production operations than the system of scheduled maintenance used by pipelines (Tr. 361).

Gulf's testimony also included a description of attempts to overcome *force majeure* resulting from a specific event

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[20] Transcript pages 129, 144, 147, 160, 164, and 165.

—loss of a well as a result of Hurricane Carmen in 1974 (Tr. 297-307). Gulf's witness also described Gulf's enhanced recovery efforts in the West Delta 27 field using a nitrogen displacement procedure (Tr. 283-284).

No participant in this proceding introduced rebuttal evidence or indicated any intention to do so. New York, in its brief opposing exceptions, stated, "New York concedes the truth of all evidence presented by Gulf as to loss of production, as to Gulf's maintenance and repair scheduling and operation, and as to Gulf's reporting procedures for these volumes." Similarly the brief submitted by the Commission staff stated, "neither Staff nor any other party has challenged the facts of the claimed *force majeure* volumes."[21] Therefore, the issue now before the

[21] The factual accuracy of Gulf's evidence is supoprted by a memorandum submitted to the presiding judge by the Commission staff on November 2, 1979, subsequent to the hearing but prior to issuance of the initial decision. In that memorandum, staff stated that it did not intend to present prepared expert testimony on the question of the accuracy and reasonableness of the *force majeure* volumes claimed by Gulf. Staff then stated that it had completed a review of a random sample of events statistically selected to represent the total *force majeure* occurrences claimed by Gulf in its exhibits. In staff's opinion, the sample could be projected to entire population of occurrences at the 95 percent confidence level, meaning that the staff was 95 pecent certain that the samples have the same characteristic as the total population.

In its audit, the staff evaluated production data underlying some 405 *force majeure* events. The staff stated that it was able to trace the claimed events to the back-up documents provided and found that the claimed volumes were generally consistent with the description furnished in the underlying company records. The staff found that based on its sample, Gulf's claimed *force majeure* volumes were over-estimated by some 13 percent. The staff determined that this difference was not unreasonable and concluded that Gulf's claimed volumes were "within the zone of reasonableness".

In his initial decision, the judge referred to the staff's audit only in a footnote and then only for the proposition that the audit showed that Gulf's *force majeure* volumes were overstated.

We agree with the staff that a 13 percent difference in volumes is within "the zone of reasonableness". Subjective considerations,

Commission is whether Gulf's unrebutted testimony constitutes substantial evidence supporting a finding in its favor.

In reviewing the sufficiency of Gulf's evidence, we shall apply the standards set forth in the Administrative Procedure Act, the Commission's rules of practice, and applicable judicial decisions. Section 556(d) of the Administrative Procedure Act requires that a decision be supported by and in accordance with reliable, probative, and substantial evidence. Section 1.26 of the Commission's rules of practice requires that evidence be of the kind which would affect reasonable and fair-minded men in the conduct of their daily affairs. Substantial evidence has been defined by the Supreme Court as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[22] It must afford a substantial basis of fact from which the fact in issue can be reasonably inferred.[23]

Applying these standards, we find Gulf's evidence meets in all respects the requirements of law set forth above and compels a decision in Gulf's favor.

The Commission orders:

(A) The initial decision issued herein on June 23, 1980 is reversed.

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as well as differences of opinion and methods in interpreting underlying data, can be expected to result in variation of the volumes ultimately determined. The record does not permit the conclusion that the staff's total volumes projected from its analysis of sample occurrences is more accurate than Gulf's claimed volume based on the data universe. The Commission is well satisfied, however, based on the staff's audit, that Gulf's *force majeure* volumes are within the zone of reasonableness.

[22] *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197 (1938). See also *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951).

[23] *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939).

(B) The *force majeure* volumes claimed in this proceeding by Gulf are approved.

(C) The *force majeure* phase of this proceeding is terminated.

By the Commission.

[SEAL]

/s/ Lois D. Cashell
LOIS D. CASHELL,
Acting Secretary.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: C. M. Butler, III, Chairman;
Georgiana Sheldon,
J. David Hughes and
A. G. Sousa.

Docket No. CI64-26-000 (Force Majeure)

GULF OIL CORPORATION

ORDER DENYING REHEARING

(Issued April 12, 1982)

In Opinion No. 136, issued January 22, 1982, the Commission held that the refund obligation imposed upon Gulf Oil Corporation (Gulf) in Opinion Nos. 780 and 780-A [1] for failure to deliver the amount of gas required by its certificate of public convenience and necessity and the underlying warranty contract with Texas Eastern Transmission Corporation should be reduced to reflect the volumes of gas not delivered by reason of *force majeure*. Applications for rehearing have been filed by Washington Urban League (Urban League), the Public Service Commission of the State of New York, and Philadelphia Gas Works.[2] On March 24, 1982, the Commission granted rehearing for the purpose of further consideration.

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[1] 56 FPC 2293 (October 15, 1976) and 56 FPC 3492 (December 9, 1976).

[2] Gulf has filed a motion to reject and strike Urban League's application for rehearing, on grounds that Urban League has not shown itself to be a person aggrieved by the Commission's decision in this case. Urban League has replied to that motion.

We find that Urban League, as representative of its members and their consumer interests, has presented sufficient facts to show

Upon consideration, the Commission finds that the applications for rehearing present no facts nor principles of law not considered by the Commission in Opinion No. 136. Accordingly, we affirm Opinion No. 136 without modification.

The Commission orders:

The applications for rehearing of Opinion No. 136 are denied.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB,
Secretary.

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real or threatened economic injury to its members. Gulf's motion is denied.

DC-B-12

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

REFUNDS

Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith, Georgiana Sheldon, Matthew Holden, Jr., and George R. Hall.

Docket No. CI64-26

GULF OIL CORPORATION

ORDER GRANTING NOTICE, DIRECTING FILINGS, AND SETTING CERTAIN ISSUES FOR HEARING

(Issued January 17, 1979)

On October 15, 1976, the Commission [1] issued Opinion No. 780 [2] in the captioned docket, ordering Gulf Oil Corporation (Gulf) to deliver gas to Texas Eastern Transmission Corporation (TETCO) "at a rate of 625 MMcf per day beginning on December 15, 1976. . . ." (Order at 18).

Ordering Paragraph (B) of that opinion required Gulf to file a computation of refunds due TETCO's rate-payers for past underdeliveries of Gulf. Pursuant to this Para-

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[1] This proceeding was commenced before the FPC. By the joint regulation of October 1, 1977, (10 CFR 1000.1), it was transferred to the FERC. The term "Commission", when used in the context of action taken prior to October 1, 1977, refers to the FPC; when used otherwise, the reference is to the FERC.

[2] *Opinion And Other On Deliveries Of Gas Under Certificate And Warranty Contract*, Docket No. CI64-26.

graph (B), Gulf filed a computation of refunds on December 15, 1976.[3]

Ordering Paragraph (E) required TETCO to file a plan for the flow-through to its jurisdictional customers of the monies Gulf must refund. This flow-through plan was to include "the amount payable to each jurisdictional customer, the basis used to compute the amount payable, and the periods involved." (Order at 19).

The Commission issued Opinion No. 780-A[4] on December 9, 1976. Gulf, thereafter, filed a petition for a stay of the Commission orders in the Third Circuit Court of Appeals, and the Court issued a "Temporary Stay" on December 15, 1976 and a "Stay Pending Review" of the Commission's Opinions and Orders on December 22, 1976.[5]

The stay of the Commission's Orders was lifted February 24, 1978 effective upon the entering of the judgment by the Third Circuit following the Supreme Court's Denial of Gulf's Petition for Writ of Certiorari on February 21, 1978.

TETCO filed its "Plan for Flow-Through and Recoupment of Refunds" on June 22, 1978 pursuant to Ordering Paragraph (E) of Opinion No. 780. TETCO asserted that it had "surveyed its customers and the relevant State Commissions as ordered the Commission. It appears," continued TETCO, "that a substantial majority of Texas Eastern's customers would prefer that the refunds be

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[3] Gulf's December 15, 1976 filing included a Schedule (B) and Schedule (C) which included therein *force majeure* volumes of gas Gulf estimated was not delivered due to the lack of OCS lease sales during the years 1962-1972. Gulf's argument was rejected by the Court of Appeals on review of the Commission's Opinion Nos. 780 and 780-A and is moot.

[4] *Opinion And Order Denying Rehearing In Part*, Docket No. CI64-26, issued December 9, 1976.

[5] *Gulf Oil Corp.* v. *FPC*, No. 76-2596. The Court affirmed the Commission's Orders on September 7, 1977, 563 F.2d 588 (CA-3, 1977) *cert. denied* February 21, 1978, 46 USLW 3526.

placed in escrow, with the proceeds from investment from such refund monies to be paid to the customers. In accordance with the desire of such customers, Texas Eastern submits the following Refund Flow-Through Plan." (Plan at 2).

Gulf, on July 24, 1978, filed a letter in response to TETCO's Refund Flow-Through Plan which advised the Commission that it reserved all of its rights under Opinion No. 780-A "with respect to the entitlement of Texas Eastern's customers to the refund and as to the amount of the refund which should be remitted to Gulf".

By letter of May 3, 1978 Gulf filed a "Supplemental Statement Reflecting Refund and Interest". In a June 16, 1978 letter, Gulf filed a "Revised Supplemental Statement Reflecting Refund And Interest" and Gulf, by letter of July 14, 1978 filed its third "Revised Supplemental Statement Reflecting Refund And Interest" pursuant to Ordering Paragraph (B) of Opinion No. 780. On August 21, 1978, Gulf filed its "Fourth Supplemental Statement" Reflecting Refund And Interest to July 1, 1978. Gulf filed its Fifth and Sixth Supplemental Statements, revising earlier refund calculations, by letters dated September 14 and October 11, 1978 respectively. In the October 11, 1978 letter, Gulf now estimates its refunds liability for the period July 31, 1971 thru July 31, 1978 at $80,899,539.33 of principal and $19,786,317.96 of "interest".

Ordering Paragraph (F) of Opinion No. 780 requires Gulf to file monthly reports of its deliveries to TETCO. Pursuant to an understanding between Staff and Gulf, as set forth in a January 26, 1977 letter to Mr. Carroll L. Gilliam, Esquire (Gulf's counsel) from Mr. Allan A. Tuttle, Esquire (the then Commission's Solicitor), Gulf has filed monthly reports pursuant to Ordering Paragraph (F) during the pendancy of judicial review.[6]

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[6] By letter filed September 28, 1978, Gulf stated that for August, 1978 its average daily deliveries to TETCO were 738,886 Mcf and, in addition, it had average daily *force majeure* volumes of 101,523 Mcf.

By letter dated March 23, 1978 Staff requested Gulf to explain, in detail, how the company arrived at the monthly *force majeure* volumes as set forth in its "computation of refund" filings, as well as included in its monthly "reports of deliveries". Gulf responded to Staff's request in a April 12, 1978 letter.

The Public Service Commission of the State of New York (New York) filed a "Motion for Prompt Action on Plan For Flow-Through And Recoupment of Refunds" on June 28, 1978. New York requests the Commission to take prompt action to "effectuate Opinion No. 780 by directing Gulf to pay Texas Eastern for the account of its customers at least $100,000,000 of the refunds and interest presently due, and either approve the Texas Eastern escrow plan for flow through and recoupment of the Gulf refunds, or establish an interim mechanism which will provide full protection to Texas Eastern customers pending determination of an appropriate flow through plan". (Motion at 3). On August 2, 1978, Gulf filed a response in opposition to New York's June 28, 1978 Motion. Gulf stated that New York's request of the Commission to direct Gulf to make an immediate payment to TETCO of at least $100,000,000 "would conflict with Ordering Paragraph (B) of Opinion No. 780, which states in pertinent part, 'Gulf shall make the required refund to Texas Eastern within 30 days of Commission approval of Gulf's computation of refund.' ".

On October 19, 1978, New York filed a letter with the Commission asking that its June 28, 1978 Motion be acted upon expeditiously. New York reiterated its request that the Commission order Gulf to make "such refunds as its filings purport to show are due now . . . pending final Commission action on the other issues raised by the Gulf filings including the propriety of its huge *force majeure* claims." (Letter at 2).

There are a number of issues which remain to be resolved in this docketed proceeding. Namely, (1) are the

volumes of *force majeure* shown in the aforementioned Gulf filings accurate and reasonable and should any *force majeure* be authorized in a warranty sale; (2) are the computations of refunds, both principal and interest, made by Gulf correct; (3) what are the specific terms of the "Escrow Agreement" proposed by TETCO, including, *inter alia*, the interest, net of expenses, offered by the bank on the principal sums deposited; (4) to which of TETCO's jurisdictional customers, and in what percentages of the whole, will the net proceeds of the Escrow Account be distributed as proposed in TETCO's "Refund Flow-Through Plan" and (5) have the affecetd TETCO customers and pertinent State Regulatory Commissions been apprised by such specifics, in accordance with Opinion No. 780, Ordering Paragraph (E)?

Ordering Paragraph (B) of Opinion No. 780 sets forth the Commission's directive concerning Gulf's calculation of refunds for the period of time from November 1, 1964 to December 1, 1976 in which Gulf failed to meet its certificated delivery obligations. Pursuant to this Ordering Paragraph, relating to a "locked-in" period of time, Gulf on December 15, 1976, filed the required refund report. The Third Circuit stayed the Commission from further action on the refund computations by Orders Granting Stays issued December 15, and 22, 1976 (*supra*). But for these stay orders the TETCO jurisdictional customers would have received the time value of the refunded monies from December 15, 1976, without obligation to repay Gulf such monies under the recoupment portion of the Commission's Order.

In these circumstances the jurisdictional customers of TETCO should receive the interest accrued on and after December 15, 1976 on the refunds owing as of that date, as if a stay had never been issued by the Court of Appeals. As the Commission said in Opinion No. 780-A, at 10, "Gulf's loss of the time value of the amounts refunded is simply a proper reflection of loss suffered by Texas

Eastern's customers from Gulf's failure to deliver its contract or certificate volumes of gas".

The interest accrued on and after December 15, 1976 on the refund amount determined to be due for underdeliveries from November 1, 1964 to December 1, 1976 is to be passed through to the jurisdictional customers of TETCO without obligation on their part to allow Gulf to "recoup" such interest pursuant to Ordering Paragraph (D) of Opinion No. 780 as amended by Opinion No. 780-A. Consequently, when Gulf is required to make refunds, the interest on such refunds for the period on and after December 15, 1976, will be flowed through to Texas Eastern's customers.

The Commission hereby notifies all concerned about the various filings made to date in this docketed proceeding and discussed above, and, with the exception of the *force majeure* issue discussed below, invites comments thereon from any interested person. The Commission wishes to call particular attention to the following matters: (a) New York's June 28, 1978 motion for immediate flow-through of uncontested refunds; (b) TETCO's escrow plan; (c) the alternative plan to flow-through the refund to the ultimate rate payer; (d) the disposition herein of the interest accrued on and after December 15, 1976, on Gulf's refunds.

Texas Eastern is directed to furnish the Commission with a copy of the proposed "Escrow Agreement", setting forth all the terms and conditions of such agreement. Texas Eastern shall submit its detailed flow-through plan, designating each jurisdictional customer who will share in the net proceeds of the "Escrow Account" and the basis for the computation of each such customer's share. Texas Eastern shall file, under oath by a responsible company officer, a statement attesting to the correctness of the volumes of gas delivered to it by Gulf and included within the various Statements Reflecting Refund and In-

terest filed by Gulf on and after December 15, 1976. TETCO shall also file its comments as to the correctness of Gulf's computations of refunds and interest set forth in Gulf's December 15, 1976 Statement as revised. In addition, TETCO shall file an alternative plan for the distribution of the corpus of the refunds to its jurisdictional customers and the plan for Gulf's recoupment thereof. In this context, "corpus" is defined as the principal and interest calculated to be owed by Gulf for all underdeliveries from November 1, 1964 through December 1, 1976. Texas Eastern is directed to file all of the aforementioned documents and information within 30 days of the issue date of this order.

The Commission hereby sets the *force majeure* issues down to a hearing to determine whether the claimed *force majeure* volumes are accurate and reasonable and should be allowed. To this end, Gulf is directed to assist the Staff's review and examination by complying promptly with all relevant Staff requests for documents and or information. The Commission directs the parties to the hearing to elaborate their respective views on, among other related issues, whether any *force majeure* is appropriate in a warranty sale, and if so, whether the *force majeure* volumes asserted in Gulf's filings are accurate and reasonable and should be allowed.

The Commission orders:

(A) Pursuant to the Natural Gas Act, particularly Sections 4, 5, 7, 8, 10, 14 and 16 thereof, the rules and regulations thereunder, (18 CFR, Chapter I), the Natural Gas Policy Act of 1978, (Pub. L. 95-621, *et seq*). and the regulations thereunder (18 CFR, Chapter I, Subchapters H and I), the Commission hereby orders a public hearing in the captioned docket, to be held in a hearing room of the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C., 20426 for the purpose of hearing and disposition of the *force majeure* issues in this proceeding.

(B) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge for that purpose (see Delegation of Authority, 18 CFR § 3.5(d)) shall preside at the hearing in this proceeding, with authority to establish and change all procedural dates, and to rule on all motions (with the exception of motions to consolidate and sever, and motions to dismiss), as provided for in the Rules of Practice and Procedure.

(C) Gulf, and any intervenor supporting Gulf's position as to the accuracy and reasonableness of the asserted *force majeure* volumes as set forth in the filings by Gulf made pursuant to the Commission's Opinion Nos. 780 and 780-A, shall file its direct testimony and exhibits on the *force majeure* issues, including a full explanation of the factual basis and the rationale for each claim of the *force majeure*, on or before February 21, 1979. All testimony and exhibits shall be served upon the Presiding Administrative Law Judge, the Commission Staff, and all parties to this proceeding. Gulf shall file not only opinion evidence on the *force majeure* issues, but also sufficient underlying data so that the reasonableness and credibility of the opinion evidence can be weighed by application of traditional evidentiary standards.

(D) The Commission Staff shall examine, and copy where it feels appropriate, the records, accounts, memoranda and other documents of Gulf pertaining to the *force majeure* issues. To this end, Gulf is directed to assist the Staff's examination by promptly complying with all relevant requests for documents and/or information.

(E) The Presiding Judge shall preside at a prehearing conference to be held on April 4, 1979 at 10:00 A.M. E.S.T. in a hearing room at the address noted in Ordering Paragraph (A).

(F) Texas Eastern shall, within 30 days of the date of issuance of this order, file with the Commission, with

copies to the Commission Staff, all parties of record in Docket No. CI64-26, all its jurisdictional customers and affected States' Regulatory Commissions, its proposed "Escrow Agreement" setting forth all its terms and conditions, which if duly executed and approved, would be the operative "Escrow Agreement" regarding the refund flow-through and recoupment provided for in Opinion Nos. 780 and 780-A. Texas Eastern shall simultaneously file its detailed flow-through plan, designating each jurisdictional customer by name, and its proposed respective percentage entitlement of the net proceeds of the "Escrow Account" by payment period, and all supporting work papers and schedules. Texas Eastern shall file, at the same time as the above-stated filings: (1) a statement under oath by a responsible company officer, attesting to the correctness of the volumes of gas delivered to it by Gulf and included within the various Statements Reflecting Refund and Interest filed by Gulf on and after December 15, 1976. In the event Texas Eastern considers the stated volumes incorrect, it shall explain the basis for its disagreement; (2) a statement regarding the correctness of Gulf's computations of monetary refunds and interest as set forth in the aforementioned Gulf filings; (3) a plan for the distribution and recoupment of the entire principal and interest to its jurisdictional customers, of the refunds calculated to be owed for Gulf's underdeliveries during the period November 1, 1964 through December 1, 1976.

(G) Comments on any of the matters set forth in this order and the filings made pursuant thereto, except for those issues listed in Ordering Paragraphs A - E, above shall be filed with the Commission and its Staff at its offices at 825 North Capitol Street, N.E. Washington, D.C. 20426 with copies served on all parties, within 60 days of this order's issue date. Such comments will be considered in determining appropriate action, but those filing comments will not, as a result thereof, become parties to this proceeding.

(H) The Commission will defer action on New York's June 28, 1978 Motion until it has had an opportunity to review the comments filed herein.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PRODUCER REFUNDS

Before Commissioners: C. M. Butler III, Chairman;
Georgiana Sheldon,
J. David Hughes and
A. G. Sousa.

Docket No. CI64-26

GULF OIL CORPORATION

ORDER DENYING REHEARING AND DIRECTING REFUNDS

(Issued December 18, 1981)

I. INTRODUCTION

On January 17, 1979 the Commission issued an order in this docket directing Gulf Oil Corporation (Gulf) and Texas Eastern Transmission Corporation (TETCO) to make certain filings concerning the amount of refund to be paid by Gulf for certain underdeliveries of gas to TETCO.

Gulf filed an application for rehearing and motion for clarification of our January 17, 1979 order on February 7, 1979, asserting that the Commission erred in the following four ways: (1) the Commission was incorrect in stating that Gulf could not recoup interest on refunds accruing on and after December 15, 1976; (2) it was error to set the issue of whether *force majeure* is appropriate in a warranty sale for a hearing; (3) it was error not to set the issue down for a hearing of the amount of damages suffered by the TETCO customers resulting from

Gulf's breach of contract; (4) Gulf was denied due process by not being afforded an opportunity to file reply comments concerning the refund issue.

II. SUMMARY OF ORDER

This order responds to Gulf's assertions of error and resolves the remaining issues in this proceeding (except *force majeure*). In summary, the Commission orders Gulf to pay into an escrow fund an amount due and owing for past underdeliveries of gas which includes interest on that amount through December 15, 1976. Gulf is to calculate the amount to be escrowed in accordance with the formula as set forth in this order. These monies may be recouped by Gulf pursuant to this order.

Gulf is further ordered to pay to TETCO for flow-through to TETCO's customers an amount of money equivalent to the interest accrued on the corpus since December 15, 1976. This interest amount is not recoupable by Gulf in accordance with the discussion below (p. 16). Gulf shall recoup on a monthly basis that portion of the refund corpus equivalent to its deliveries over 625MMcf/D.

The escrow agent shall pay TETCO semiannually an amount equivalent to the interest on the escrowed monies, net of approved expenses, to be flowed through to TETCO's customers pursuant to the plan approved in this order.

This order also requires TETCO to file within 30 days a completed and duly executed Escrow Agreement, as conditioned herein. The Commission or its delegate shall notify TETCO, the escrow agent and Gulf of its approval within 20 days of receipt thereof. Within 10 days of such approval Gulf shall pay over the refund corpus to the escrow agent in accordance with this order. In the event that the Escrow Agreement is not approved within the stated time, all further action by all parties is stayed pending further Commission action.

III. BACKGROUND

To place the present issues into perspective, a brief history of this proceeding is necessary.

On November 7, 1975, the Commission initiated a show cause proceeding in Docket No. CI64-26 regarding Gulf's compliance with its delivery obligations under its 1963 certificate. After a hearing, the Presiding Administrative Law Judge concluded that Gulf was not meeting its warranted delivery obligations and ordered specific performance. The Commission, in Opinion Nos. 780 and 780-A, agreed with the Judge's conclusions. Upon judicial review, the Third Circuit affirmed the Commission in *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588 (1977).

Gulf was directed in Opinion No. 780 to deliver 625,000 Mcf per day to TETCO, except on the days when TETCO demanded less. Opinion No. 780 stated that future noncompliance by Gulf, would result in the Commission seeking judicial enforcement of its orders. Furthermore, the Commission directed Gulf to pay refunds due as a result of its default to the TETCO customers. Gulf would be allowed to recoup the monies paid to TETCO's customers (in accordance with procedures established by the Commission) upon delivery of gas equivalent to the default volumes. The Commission envisioned that by the end of the sale, Gulf would have delivered to TETCO its contracted-for quantities and that TETCO would pay the contract rate for such deliveries.

The Commission's January 17, 1979 order now at issue established these refund-recoupment procedures.

The recent procedural history follows:

January 17, 1979 —"Order Granting Notice, Directing Filings, And Setting Certain Issues For Hearing" issued. (January order)

February 7, 1979 —Gulf filed for rehearing and clarification of the January 17, 1979 order.

February 16, 1979 —TETCO filed its plan for flow-through and recoupment of Gulf's refunds pursuant to Ordering Paragraph (F) of the January order.

March 9, 1979 —"Order Granting Rehearing For Purposes Of Further Consideration" issued by the Commission.

March 16, 1979 —Gulf filed comments on the TETCO escrow plan as well as on the issues set forth in the January 17, 1979 order.

March 16-20, 1979 —Comments regarding the issues raised in the January order were filed by each of five intervenors: Public Service Commission of the State of New York (New York); New Jersey Natural Gas Company (New Jersey); New England State Commissions (New England); Brooklyn Union Gas Company (Brooklyn Union); and Public Service Electric and Gas Company (Public Service).

March 23, 1979 —Gulf filed its direct testimony and exhibits on the *force majeure* issue as required by the January 17, 1979 order.

April 13, 1979 —Gulf filed a motion for leave to file reply comments and its re-

ply to the March, 1979 comments of the five intervenors.

July 10, 1979 —A Pre-hearing Conference was held by the Presiding Administrative Law Judge on the issues of *force majeure*.

July 12, 1979 —New York filed a Motion for Prompt Action in Accordance With Commission Order regarding the refunds Gulf was obligated to pay.

September 11-12, 1979—Hearings were held before the Presiding Judge on the *force majeure*.

June 23, 1980 —Presiding Judge's Initial Decision.

August 25, 1980 —All Briefs On and Opposing Exceptions to the ALJ's decision had been filed.

By this order, the Commission resolves all remaining issues in this proceeding except those concerning *force majeure*.

IV. ISSUES

In the January 17, 1979 order we enumerated the remaining issues in the proceeding generally as follows: (1) whether the *force majeure* volumes claimed by Gulf are accurate and reasonabled and whether any *force majeure* should be authorized in a warranty sale; (2) are Gulf's computations of refunds, both principal and interest, correct; (3) what are the specific terms of the "Escrow Agreement" proposed by TETCO and how will the monies be distributed; and (4) have all affected TETCO customers and pertinent State Regulatory Commissions been apprised of the specifics of the "Escrow Plan"? [Order at 5].

The Commission also indicated that interest which has accrued on the refund amounts since December 15, 1976 (the date Gulf obtained a stay of Opinion Nos. 780 and 780-A from the Third Circuit Court of Appeals) should be refunded to the TETCO customers without right of recoupment by Gulf [Order at 6]. The *force majeure* issues were set for hearing, and the Commission invited comments from all concerned on the other issues. Five intervenors as well as Gulf commented *inter alia* on various aspects of the refund-recoupment plan submitted by TETCO pursuant to our January 7, 1979 order.

V. DISCUSSION

A. *Gulf's Refund Obligation*

We first address the question of Gulf's obligation to pay refunds. In Opinion No. 780,[1] the Commission determined that Gulf should pay refunds based on the difference between the contract price of the undelivered gas and the applicable national or area ceiling rate at the time of underdeliveries [Opinion No. 780, *mimeo* at 10]. On any day when Gulf delivered volumes equivalent to a portion of its past shortfall (provided first that its actual daily deliveries equalled or exceeded the certificated daily obligation of 625 MMcf/d) the Commission provided for recoupment of the equivalent refund monies by Gulf. Under this plan, Gulf will have recouped the entire refund corpus when the total prior default has been made up through such excess deliveries.[2]

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[1] Opinion No. 780, Gulf Oil Corporation and Texas Eastern Corporation, Docket No. CI64-26, *Opinion and Order on Deliveries of Gas Under Certificate and Warranty Contract*, issued October 15, 1976.

[2] The refund corpus is the amount of principal plus accrued interest which Gulf owed as of December 15, 1976 on its underdeliveries to that time. The method of accounting for any underdeliveries made subsequent to December 15, 1976 is explained later in this order at pp. 19-21.

In its comments filed on March 16, 1979, Gulf took the position that no refunds should be required because the "ultimate consumers have suffered no loss and, in fact, will receive substantial benefits from the delay in deliveries." (Gulf at 2). Specifically, Gulf claimed that consumers benefit from receiving these deficiency volumes at the present time rather than as scheduled under the warranty contract, due to the recent rapid increases in natural gas prices. (Gulf comments at 2-5 and see Gulf's Application For Rehearing *mimeo* at 9-10).

Gulf also argued that TETCO's customers must prove the damages suffered by such customers as a result of Gulf's underdeliveries as a prerequisite for the assessment and calculation of refunds. Gulf cited language in Opinion No. 780-A indicating that if the Commission should decide that the ultimate amount of damages to all TETCO customers is less than the refund Gulf paid to TETCO the excess will be remitted to Gulf (Opinion No. 780-A, *mimeo* at 9). In contrast, the Public Service Commission of New York (New York) commented that this language referred to the eventual distribution of refunds and was not a relevant factor with regard to computation or initial payment of the refunds. Additionally, New York failed to see how damage to TETCO and its customers will not be greatly in excess of any loss Gulf may incur through making refunds since Gulf will recoup the refunds and lose only the time value of the money since December 15, 1976.

Gulf's argument that proof of damages must precede payment of refunds has been rejected in the earlier proceedings. In *Gulf Oil Corporation* v. *FPC*,[3] the Third Circuit pointed out that the refund recoupment order was not intended as a measure of damages but rather as a method of enforcing Gulf's compliance with its cer-

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[3] 563 F.2d 588 (3d Cir. 1977) *cert. denied*, 434 U.S. 1062 (1978).

tificated delivery obligations. The Third Circuit approved the Commission's refund-recoupment plan saying:[4]

> The FPC was confronted in this case with a massive default on the part of Gulf, a blatant breach of the warranty on the basis of which Gulf was awarded its certificate . . . . In short, the Commission was justified in believing that Gulf needed a reasonable external prod to ensure its compliance with the Commission's order.
>
> The refund-recoupment order also serves two other important purposes. First, by requiring that Gulf pay a refund on every occasion in the future that it underdelivers, the order discourages non-compliance. Second, by reducing the profits Gulf achieved by its past derelictions, Gulf and other gas producers are put on notice that nothing is to be gained by failing to timely comply with their certificates of public convenience.
>
> Given the circumstances of this case *and the sound purposes and public interest to be served by the refund-recoupment order* in protecting consumers with an adequate supply of natural gas at just and reasonable rates . . . we hold that the refund-recoupment order has a rational basis and is neither arbitrary nor capricious, nor an abuse of the Commission's discretion.

The Third Circuit also upheld the Commission's formula for calculating refunds saying that:

> the dispute over the [refund] formula is comparable to a dispute over the amount of a security bond. In the case of such a bond, the amount fixed by the district court will not be disturbed absent an abuse of discretion . . ., and we believe the same standard should pertain here. We cannot say that the Com-

[4] *Id.* at 608, footnote omitted, emphasis added.

mission's formula is so unreasonable as to constitute such an abuse of discretion.[5]

Thus the imposition upon Gulf of this refund-recoupment scheme by the Commission has already been scrutinized and sustained upon judicial review.

Moreover, to relieve Gulf from its refund obligations would be clearly inequitable to the TETCO customers. It was they who experienced injury because of Gulf's underdeliveries. Under the recoupment scheme Gulf will be permitted the opportunity to recover all refunded amounts except the interest accruing after December 15, 1976. Thus, there is no windfall to TETCO's customers by retention of both refunds and payback volumes. Gulf merely pays the amount which resulted from its prior non-compliance. We find that the plan has the effect of preventing Gulf from retaining any advantage from non-compliance with the Commission's certificate.

Gulf's claim that the customers have benefited from its belated compliance with its certificate and contract obligations is irrelevant and incongruous.[6] The purpose of the refund is to force Gulf to live up to its obligations.

Gulf asserts in its reply comments[7] filed April 13,

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[5] *Id.* at 609.

[6] It is hardly a credible defense for a wrongdoer to assert that it should not be held accountable to those injured as a result of its wrongful actions, by using its own unlawful actions as a shield. The Commission, in Opinion No. 780, determined that Gulf's default resulted in injury to TETCO's customers in forcing them to find replacement fuel at the higher area or national rate. The doctrine of *res judicata* prohibits Gulf from asserting this defense again. *U.S.* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421 (1966).

[7] No provision was made in our January 17, 1979 order for reply comments. On April 13, 1979 Gulf filed a Motion For Leave to File Reply Comments together with its Reply Comments. Due to the complex nature of the issues, the Commission finds it in the public interest to grant Gulf's Motion and accept its Reply Comments for review.

1979, that no interim refunds may be ordered before all remaining issues are resolved. Gulf contends that it should pay no refunds to TETCO until the Commission approves the computation of refunds in its entirety. Such approval, according to Gulf, cannot occur until certain issues affecting the amount of the refunds and the mechanics of the refund-recoupment formula are determined.[8] Gulf cites as unresolved issues: the *force majeure* volumes claimed, its method of matching the most recent excess deliveries against most recent deficiencies; recoupment of interest accrued after December 15, 1976; and finally, whether refunds should be assessed at all.

We reject Gulf's assertion that no interim refunds can be ordered because issues affecting the total amount to be refunded remain unresolved. The question of whether refunds should be ordered has been conclusively determined in the Opinion No. 780 proceedings. Moreover, all of the other issues are resolved herein, except *force majeure*. The *force majeure* issues involve identifiable volumes of gas, the value of which can be estimated.[9] Those issues have been decided by separate order issued in the above-entitled proceeding. The refunds ordered here do not include any *force majeure* volumes claimed by Gulf.

The shortfall in Gulf's deliveries of gas during the period 1971-1977 to TETCO has been determined. The refund formula which was designed to compensate the

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[8] The Commission notes that Gulf's "recent vintage" (RV) method of recouping its refund liability acts to continually change the amount of refund due, thereby making impossible a "final" computation of refunds. (See, discussion of the RV method *infra* at 15-16. The Commission understands that the RV method operates similarly to the last-in first-out method (LIFO) of accounting).

[9] Gulf has claimed approximately 74 Bcf of *force majeure* during period August, 1971 to April 30, 1977 valued at approximately $31,000,000. This amount is not included within the refunds directed by this order, nor is the interest thereon so included.

TETCO customers for this failure has been approved by the courts. As discussed above, the refund requirements are intended to insure that Gulf continues to fulfill its certificate obligations.

Gulf owes approximately $45,300,000 [10] in refunds and interest for underdeliveries, excluding *force majeure* volumes.[11]

B. *TETCO's Escrow Plan And Alternative Flow-Through Plan And Parties' Comments Thereon*

In our January order (Ordering Paragraph F) we directed TETCO to file its proposed escrow agreement, its alternative direct flow-through plan, a filing attesting to the correctness of the gas volumes in Gulf's various Statements Reflecting Refunds and Interest, as well as to the accuracy of Gulf's computation of monetary refunds and interest.

On February 16, 1979, TETCO filed its response. The escrow agreement TETCO submitted would set up an initial escrow account for refund monies for the period covered by Gulf's initial refund report (August 1, 1971 to October 31, 1976, with interest to December 15, 1976).

Separate escrow accounts would be set up for each succeeding month in which Gulf incurs a refund obligation.[12] At present, such accounts need to be esablished for the months November and December 1976 and January, Feb-

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[10] This refund corpus is calculated as of October 1, 1981.

[11] In addition to the refund corpus, our staff calculates that the interest that has accrued on the refunds from December 15, 1976 through October, 1980 is approximately $29,200,000. This interest, upon final computation, shall be flowed through to the TETCO customers, and is not recoupable by Gulf.

[12] Separate escrow accounts are necessary to account for the fact that after October 31, 1976, not all of TETCO's customers purchased gas every month in the same proportionate percentages.

ruary and September, 1977.[13] The TETCO escrow plan did not provide for interest accruing after December 15, 1976 to be included in these additional accounts; rather that interest would be paid directly to TETCO for flow-through to its customers.[14] Recoupment would be made by Gulf from the individual escrow accounts.

TETCO also submitted a direct flow-through plan for the refunds as an alternative to the escrow plan. This plan would immediately distribute to TETCO's customers all refunds due from August 1, 1971 to the present. Recoupment by Gulf would be from each of the TETCO customers that received a portion of the refund.

Under this flow-through plan, for each month Gulf defaulted on its deliveries TETCO would calculate the volume of gas not received by each customer equivalent to that customer's pro rata share of the total pipeline curtailment, and distribute the refunds accordingly.

The escrow plan and the direct flow-through plan were discussed by all commentors. Gulf requested that the Commission disapprove both plans on the ground that neither reflect the actual detriment suffered by each TETCO customer. Gulf claims that TETCO erroneously assumed in constructing the plan that each customer was injured in direct proportion to their share of the total curtailment on the TETCO system. Since this comment is based on Gulf's belief that a determination of damages must precede refund payment, we must reject it for the reasons expressed in Section A.

Generally, the commentors favor the escrow method over the flow-through method. New England and New Jersey noted the comparative simplicity of such an es-

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[13] Gulf did not incur further monthly refund obligations after March 1977, with the exception of September, 1977.

[14] As explained in Section IV, Gulf is not entitled to recoup any of the interest on the separate escrow accounts accruing subsequent to December 15, 1976.

crow arrangement. Brooklyn Union felt that an escrow plan would insure that Gulf would not recoup more than it paid in refunds. Public Service said that although it preferred a direct flow-through plan, it would not oppose an escrow arrangement.

Gulf objected to Paragraph Seven of the Escrow Agreement which requires Gulf, in order to obtain recoupment monies, to first submit a Commission order or other evidence stating Gulf is entitled to recoup certain of the escrow funds. Gulf contends that all it must do to collect any recoupment monies is to make a notice of rate increase filing and that therefore the agreement, insofar as it requires a written order, is inconsistent with Opinions 780 and 780-A. Public Service suggested that the escrow plan be modified to require Gulf to deposit refund monies directly into the escrow account instead of sending them to TETCO for deposit as presently provided. Public Service objected to the establishment of separate escrow account for refunds arising after December 15, 1976 out of concern that recoupment dollars may be taken from the wrong accounts and work a disproportionate effect among TETCO's customers. New England requested us to exclude all interest accrued during 1971-1976 from the monies deposited in the initial escrow account and, instead, directly flow-through such interest to TETCO's customers without right of recoupment by Gulf.

We have carefully examined TETCO's escrow plan and the alternative refund and recoupment plan, and have considered all comments. The refund recoupment scheme set up in Opinion No. 780 is a complex one involving large sums of money. Therefore it is necessary that any plan for distribution of refunds be as simple to administer as possible. With that in mind and in light of the desires of the TETCO customers, we conclude that the refunds should be distributed under the terms of the

submitted escrow plan as conditioned herein. We believe this plan is the more administratively practicable method.

The Commission has considered the modifications proposed in the comments. With respect to Gulf's concern about the requirements of Paragraph 7 of the Escrow Agreement, we shall not require Gulf to make a rate change filing reflecting recoupment of amounts held in escrow. Instead, Gulf shall be required to file a notice of recoupment in accordance with the order. Thereafter, the Commission or its delegate shall notify Gulf, TETCO, and the Escrow Agent within 30 days of receipt of Gulf's recoupment notice of its approval or disapproval. Thereafter, if approved, Gulf is authorized to collect the stated monies from the Escrow Agent without further order of the Commission. Additional details of the refund-recoupment mechanism are set forth below.

Public Service's comment regarding direct deposit is well taken. We shall direct Gulf to pay the refund amount directly to the escrow agent, and instruct TETCO to modify the Escrow Agreement accordingly.

TETCO's February 16, 1979 Response included statements, in attesting to the correctness of Gulf's computation of delivered gas volumes and Gulf's calculations of monetary refunds and interest. TETCO stated that it is in "substantial agreement" with Gulf's figure. *Force majeure* volumes asserted by Gulf were accepted by TETCO for purpose of verifying Gulf's computations of refunds.

Regarding the issue of how to credit Gulf's pay-back volumes against the refunds outstanding, we agree with Gulf's proposed method of crediting pay-back volumes against the most recently accrued default volumes. Gulf's "Statements Reflecting Refunds And Interest" filed monthly since April 1978 and set forth in Gulf's March 16, 1979 comments have been calculated on the basis of crediting Gulf's most recent excess deliveries against its

most recently incurred deficiency volumes. Gulf terms this the recent vintage, or "RV" method and claims that it comports with Opinion No. 780-A. Gulf cites language in Opinion No. 780-A which states that when Gulf delivers in excess of 625 MMcf/D to TETCO "the excess shall reduce any cumulative deficiency of Gulf's performance." [Opinion No. 780-A *mimeo* at 9]. Gulf states that TETCO, in verifying that it was in substantial agreement with the refund amounts and that it accepted Gulf's methodology for purposes of verification has concurred in the RV method as required by Opinion No. 780-A. Gulf also asserts that such a method is equitable to all concerned.

Only Public Service commented on the RV method. Such a method, says Public Service, results in the recovery of refund monies at a much more rapid rate than the makeup of deficiency volumes. Public Service suggested that use of an average inventory price methodology might be more appropriate in the circumstance.

We find that the method agreed to between Gulf and TETCO falls within the meaning of Opinion No. 780-A and approve it. In Opinion No. 780-A, (*memo* at 9) the Commission said that "allowing . . . early recoupment would encourage the delivery of volumes in excess of 625 MMcf per day if desired by Texas Eastern and would be in the public interest . . . . The vintage of gas whose refund shall be recouped shall be as agreed by Gulf and Texas Eastern".

New England and New Jersey commented on other matters pertaining to the refund calculation. New Jersey believes that further vertification of Gulf's refund computations is required and that the most appropriate means of so doing would be a Staff audit. Our Staff has made independent calculations of Gulf's refund liability (separate from the *force majeure* volumes). Before final approval of refunds pursuant to Ordering Paragraph

(C) herein, our Staff is directed to analyze the filings for accuracy. This, together with TETCO's concurrence, is sufficient verification in our judgment.

New England disapproved of Gulf's practice of aggregating deficiency volumes and subtracting similarly aggregated excess volumes for the months subsequent to December 1, 1976. This method, according to New England, enables Gulf to understate its refund liability by some $8 million for the months of December 1976 and January and February 1977 and contravenes the month by month calculation contemplated in Opinion No. 780.

Since the escrow plan we have approved sets up separate escrow accounts for any month after October 31, 1976 in which Gulf incurs a refund obligation, we find it appropriate to adopt New England's suggestion and will direct Gulf to ascertain its refund liability separately for each month after October 31, 1976 in which there have been underdeliveries. Use of Gulf's method would have the effect of eliminating interest which properly should be paid by Gulf. After Gulf has determined the deficiency for the month (by aggregating all the daily volumes actually delivered) it may then begin to offset its deficiencies by its excess deliveries (over 625,000 Mcf/d) made in succeeding months.[16]

Finally, New England requested us to order Gulf to flow-through to TETCO all interest accrued during 1971-1976, rather than making it subject to recoupment along with the refund monies. We interpret the Third Circuit's affirmation of Opinion Nos. 780 and 780-A as stating that the interest accrued prior to December 15, 1976 can

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[16] As stated below, all interest accruing after December 15, 1976 on the refund corpus, as well as all interest accruing on any separate monthly accounts set up after December 15, 1976 is to be flowed through to TETCO's customers without recoupment by Gulf.

be recouped by Gulf. The Commission therefore, will deny New England's request.[17]

C. *Post December 15, 1976 Interest*

In its application for rehearing of the January 17, 1979 order and again in its comments, Gulf claimed that the provisions of Opinion Nos. 780 and 780-A entitle Gulf to recoup every dollar it will refund, including interest. Therefore, Gulf asserted that the Commission order directing flow-through of interest without recoupment is unlawful under the terms of Opinion Nos. 780 and 780-A and the opinion of the Third Circuit in *Gulf* v. *FPC, supra.* Gulf now concedes that it will not be allowed to recoup any interest earned from the time the refund is paid to the escrow agent until the refund is recouped, but it still argues that the interest on the refund which accrues from December 15, 1976 until Gulf is ordered to disgorge the refund is recoupable.

We do not agree. After a review of all the comments and the entire record in this docket, the Commission concludes that Gulf may not recoup the interest accruing on and after December 15, 1976 on the corpus of the refunds. Interest on the corpus accruing after December 15, 1976 will flow-through to TETCO's customers without recoupment, as will the interest on the monies in the escrow accounts. Our reasoning follows.

From 1971 until at least 1976, Gulf defaulted continuously on its delivery obligations to TETCO causing the pipeline to curtail its customers more deeply than it otherwise might have.[18] The Commission concluded in

[17] This is not to say that in all similar cases interest accruing before the date of a Commission order and during the period of a certificate violation must be subject to recoupment as it is here. Should the same issue arise in other cases we feel free to consider alternatives to the remedy adopted there.

[18] For example, Gulf's 1975 deliveries averaged approximately 217,000 Mcf/D less than the certificated obligation of 625,000

Opinion No. 780 that due to Gulf's default, the TETCO customers had to buy replacement gas at the higher applicable area or national rate, thus depriving them of the use of that incremental amount of money above the Gulf contract rate during part or all of the period from 1971 to the issuance of Opinion Nos. 780 and 780-A. The Commission, through its refund-recoupment mechanism, intended to leave "Texas Eastern and the consumers in approximately the same position they would have been in if they received the gas." [Opinion No. 780-A, *mimeo* at 15] Effectuation of the purpose of making the injured parties whole requires that all interest accrued after December 15, 1976 must be paid over and distributed to the TETCO customers.

In Opinion No. 780-A, the Commission specifically rejected Gulf's argument, made in its application for Rehearing of Opinion No. 780, that it should recoup all interest on the refund from the time the undelivery occurred through the time Gulf recouped its refunds.

> Gulf also contends that future recovery of its refunds should include an amount equal to the loss of present value of such funds from the date or dates of payments by Gulf to Texas Eastern to the date of future recovery by Gulf. We disagree. Gulf's loss of the time value of the amounts refunded is simply a proper reflection of loss suffered by Texas Eastern's customers from Gulf's failure to deliver its contract or certificate volumes of gas. There is no reason why the customers should, in effect, be required to pay interest on the money Gulf pays to

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Mcf/D. (*See*, Gulf Oil Corporation, Statement Reflecting Refund and Interest Computed Pursuant to FPC Opinion No. 780, filed December 15, 1976, as amended. Show Cause Transcript page 400. TETCO's Form No. 16 for the period September, 1975 through August, 1976 showed a system-wide curtailment of 27%).

> make them whole until it finally completes the delivery of the contract volume. (*Mimeo* at 10)

Although the Third Circuit in affirming Opinion Nos. 780 and 780-A did not discuss this point specifically, it appears to have recognized the appropriateness of the recovery of interest by TETCO's customers when it stated that:

> By reducing the profits Gulf achieves by its past derelictions, Gulf and other gas producers are put on notice that nothing is to be gained by failing to timely comply with their certificates of public convenience. 563 F.2d at 608.

Thus, under the Commission's refund-recoupment plan Gulf will over the life of the sale deliver the 4.4 Tcf required by the contract and will be reimbursed at the contract rate for each Mcf of gas sold. The entire refund corpus (meaning the sum due and owing on December 15, 1976, including accrued interest) and any further refunds for future underdeliveries will be recouped by Gulf from the escrow account. The customers of TETCO will receive the interest accruing after December 15, 1976 on the corpus of the refund due and owing at that time. To allow TETCO's customers to retain only the interest accruing on and after actual payment of the refund corpus to the escrow account would fail to compensate them for their earlier losses. Moreover, the fact that the interest accruing after December 15, 1976 will be distributed to TETCO's customers does not interfere with Gulf's ability to recoup the refund corpus. In fact, if anything, it would tend to stimulate Gulf to recoup the refund at a more expeditious rate. Such a result would comport with Opinion No. 780-A, *mimeo* at 9 wherein the Commission noted that "such early recoupment would encourage the delivery of volumes in excess of 625 MMcf per day if desired by Texas Eastern, and would be in the public interest."

D. *Formula For Calculating Refund, Recoupment, And Flowed-Through Interest*

The formula for calculating the *refund* (except for *force majeure* volumes) owed by Gulf is as follows:

Refund payable to escrow agent is "Refund" or "corpus" = P + P(1) + I − R.

Where: P = underdelivery volumes prior to December 15, 1976 times monetary value of difference between the then applicable area or national rates and the applicable contract rate;

P(1) = underdeliveries after December 15, 1976 times monetary value of difference between the then applicable area or national rate and the contract rate;

I = interest on P at 7% per annum prior to October 10, 1974 and 9% per annum from October 10, 1974 to December 15, 1976;

R = the monetary value of Gulf's overdeliveries (over 625 MMcf/D) made from December 15, 1976 to the end of the month preceding the month of issuance of this order.

Gulf shall file a report stating the calculations and resulting refund amount within 30 days of the issuance of this order. The Commission or its delegate shall notify Gulf, the Escrow Agent and TETCO whether the report is acceptable within 20 days following its receipt. If accepted by the Commission, or its agent, Gulf shall pay to the designated escrow agent the refund within 10 days of such acceptance. Gulf is authorized to subtract from its refund liability that amount equivalent to the volumes over 625,000 Mcf/d which Gulf has physically delivered to TETCO (i.e., its recoupment to date).

Gulf shall calculate separately all interest accrued on the above-mentioned refund corpus from December 15,

1976 to the last day of the month preceding the month of issuance of this order. The interest shall be at 9% per annum from December 15, 1976 to October 1, 1979 and ad the rate prescribed in Order No. 47, Docket No. RM77-22 thereafter. The interest prior to October 1, 1979, should be computed on a simple basis, and thereafter it should be computed on a compound basis in accordance with Order Nos. 47 and 47-A. Rates are 11.7% per annum for the period October 1, 1979 until January 1, 1980; 14.28% per annum for the period January 1, 1980 through March 31, 1980; 15.39% per annum for the period April 1, 1980 through June 30, 1980; 18.22% per annum for the period July 1, 1980 through September 30, 1980; and 11.74% per annum from October 1, 1980 through December 31, 1980; 14.03% per annum from January 1, 1981 through March 31, 1981; 19.98% per annum from April 1, 1981 through June 30, 1981; 18.27% from July 1, 1981 through September 30, 1981; and 20.31% from October 1, 1981 through December 31, 1981. Gulf shall file this interest calculation report within 30 days of issuance of this order. The Commission or its delegate shall notify Gulf and TETCO whether such report is acceptable or not within 20 days of receipt by the Commission. Gulf shall pay such interest to TETCO within 10 days of such acceptance. TETCO shall distribute such interest in accordance with its submitted report of "customers' entitlements to earnings from escrow accounts" within 15 days of receipt from Gulf and simultaneously file a report of distribution with the Commission. This interest is not recoupable by Gulf.

In order to recoup the corpus of the refund, Gulf shall file a notice of recoupment of its excess deliveries (over 625 MMCf/D), signed and agreed to by TETCO, within 30 days of the end of such month. The Commission, or its delegate, shall notify Gulf, TETCO and the Escrow Agent of the acceptability or nonacceptability of such reports within 20 days of its receipt. Gulf is authorized

thereafter to collect the value of the reported amount of excess deliveries from the escrow agent. The escrow agent shall file semiannual reports with the Commission setting forth the amount recouped by Gulf, the amount remaining in the corpus, and the agent's expenses charged to the account.

The escrow agent shall pay semiannually to TETCO (for flow-through to TETCO's customers pursuant to TETCO's report of "customers' entitlements to earnings from escrow accounts") the interest accrued on the refund corpus during the prior six months, or appropriate portion thereof. TETCO shall within 15 days of receipt of such interest, distribute the interest pursuant to the aforementioned plan and file a report with the Commission describing the distribution. This interest is not recoupable by Gulf.

If in any month hereafter, Gulf incurs further refund liability by failing to deliver at the certificated rate a separate account shall be established by the escrow agent upon receipt from Gulf of the appropriate refund. The escrow agent shall pay back to Gulf the corpus of such refund as it is recouped. All filings, reports, and monetary transactions shall follow the procedure outlined above. The interest accrued on such refund shall be paid to TETCO for distribution to its customers. This interest is not recoupable by Gulf because it would accrue, if at all, after December 15, 1976.

E. *Force Majeure*

Gulf asserted in its application for rehearing of the January 17, 1979 order that the Commission erred in setting the *force majeure* issue for hearing with respect to whether any *force majeure* should be permitted in a warranty contract. The *force majeure* issues have been decided by separate order issued in the above-entitled proceeding. The refunds ordered herein are exclusive of the *force majeure* volumes claimed by Gulf.

The Commission orders:

(A) The application for rehearing of Gulf in Docket No. CI64-26 is denied except with respect to the *force majeure* issue. All of the *force majeure* issues have been decided by separate order.

(B) The escrow plan for flow-through and recoupment of refunds submitted by Texas Eastern pursuant to our January 17, 1979 order is accepted, except as modified herein. The Escrow Agreement shall be modified to provide for the direct payment of refund monies by Gulf to the escrow agent. TETCO shall cause to be filed with the Commission, within 30 days of this order, the completed and duly executed Escrow Agreement, setting forth with particularity the expenses charged by the escrow agent (together with the calculations and workpapers underlying such calculations), the method of payment of such expenses, the interest rate (net of any expenses) which the TETCO customers will receive on the escrowed monies, the method of such interest payments and the detailed mechanism to be utilized for Gulf's recoupment of the refund corpus. The Commission, or its delegate, shall notify TETCO, the Escrow Agent and Gulf of its approval or disapproval within 20 days of receipt thereof. Within 10 days of such approval, Gulf shall pay over to the escrow agent the refund corpus in accordance with this order. In the event that the Escrow Agreement is not approved within the stated time, all further action by all parties is stayed pending further Commission action.

(C) Gulf shall file a report within 30 days of this order detailing as set forth in the body of this order (1) the amount of refund corpus owed; and (2) the interest accrued thereon from December 15, 1976, as of the last day of the month preceding the month of issuance of this order. The calculation of the refund corpus will include appropriate credit to Gulf for the amount of "overdeliveries" (or recouped gas volumes) through the last

day of the month preceding the month of this order. Gulf shall submit simultaneously the underlying workpapers to these calculations. Within 20 days of receipt of such filings, the Commission, or its delegate, shall approve or disapprove of the computations and so notify Gulf, TETCO and the escrow agent. Gulf shall pay directly to the escrow agent the refund corpus within 10 days of such approval. Gulf shall pay to TETCO the interest accrued after December 15, 1976 within 10 days of such approval. TETCO shall distribute such interest to its customers within 15 days of receipt from Gulf in accordance with its submitted report titled "customers' entitlements to earnings from escrow accounts." Simultaneously, TETCO shall file a report of such distribution with the Commission. This interest accrued after December 15, 1976 is not recoupable by Gulf.

(D) For any day in which Gulf's deliveries to TETCO exceed 625MMCF/d, Gulf may recoup the appropriate portion of the refund corpus by first submitting a report of such excess deliveries, signed and agreed to by TETCO, within 30 days of the end of the month in which such excess deliveries occurred. The Commission or its delegate shall notify Gulf, TETCO and the escrow agent of its action on such filings within 30 days following their receipt. Upon approval, Gulf is authorized to collect the approved amount from the escrow agent without further Commission action.

(E) Commencing June 15, 1982, the escrow agent shall file semiannual reports with the Commission setting forth the amount recouped by Gulf, the amount remaining in the refund account(s) and the agent's expense charged for administering the account(s). Within two months of the recoupment by Gulf of its total refund corpus, the escrow agent shall file a report chronicling the history of the account(s) including all expenses charged for the agent's services.

(F) Commencing on June 15, 1982, the Escrow Agent shall pay semiannually to TETCO for flow-through to TETCO's customers, pursuant to this order, the interest accrued on the refund account(s) during the prior six months or appropriate part thereof. Within 15 days of receipt of such interest, TETCO shall distribute it in accordance with this order and file a report of such distribution with the Commission. This interest is not recoupable by Gulf, as it accrues after December 15, 1976.

(G) If in any month hereafter, Gulf fails to deliver at the certificated 625 MMcf per day rate (or at a lower rate than demanded by TETCO in accordance with Opinion No. 780, Ordering Paragraph (F), Gulf shall file a report to the Commission within 30 days of the end of the month such "underdeliveries" occurred stating the volumes demanded, actually delivered, and claimed by Gulf under force majeure and the rates charged thereto. Within 20 days of receipt, the Commission or its delegate, shall notify Gulf, TETCO and the escrow agent of its action regarding such figures. If the Gulf report is approved Gulf shall pay to the escrow agent the appropriate amount of reported refunds within 10 days. Gulf shall be able to recoup the refund corpus, in accordance with this order. Gulf shall file a report with the Commission at the time it pays such refunds to the escrow agent setting forth the details of the payment. Upon receipt of such appropriate refund, as ordered by the Commission or its agent, the Escrow Agent shall establish a separate account for the refunds attributable to such underdelivery. All interest accruing on such account(s) shall be distributed to TETCO for its customers in accordance with Ordering Paragraph (F) above, and is not recoupable by Gulf.

(H) Gulf's Motion For Leave To File Reply Comments is granted.

(I) Any party who wishes to receive copies of the filings described herein shall so notify Gulf, TETCO and the Commission within 20 days of the date of issuance of this order.

(J) For the purposes of this order, the Commission hereby delegates to the Director, Office of Pipeline and Producer Regulation, the power and authority to perform all acts regarding the review of filings made pursuant to this order. Any appeals from Staff action shall be made in accordance with 18 C.F.R. § 1.7(d).

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB,
Secretary

APPENDIX G

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PRODUCER REFUNDS

Before Commissioners: C.M. Butler III, Chairman;
Georgiana Sheldon and
A. G. Sousa.

Docket No. CI64-26-000

GULF OIL CORPORATION

ORDER DENYING APPLICATIONS FOR REHEARING AND RECONSIDERATION, DENYING MOTION TO REJECT AND STRIKE APPLICATION, AND CLARIFYING ORDER

(Issued March 29, 1982)

On December 18, 1981, the Commission issued an "Order Denying Rehearing and Directing Refunds" (December order) in the above-captioned docket.[1] The December order denied Gulf Oil Corporation's (Gulf) application for rehearing of the Commission's January 17, 1979 order (January order) issued in this docket. The December order also set forth the procedures for implementation of the refund-recoupment mechanism outlined in Opinion Nos. 780 and 780-A.[2]

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[1] 17 FERC ¶ 61,264.

[2] 56 F.P.C. 2293 and 56 F.P.C. 3492, *aff'd, Gulf Oil Corp.* v. *F.P.C.*, 563 F.2d 588 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978).

On January 15, 1982, Gulf filed an application for rehearing and reconsideration of the December order.[3] On January 18, 1982, Washington Urban League also filed an application for rehearing. The Commission issued an order granting rehearing and reconsideration for purposes of further consideration on February 16, 1982.

Texas Eastern Transmission Corporation (TETCO) filed a motion for clarification of certain aspects of the refund-recoupment procedure on January 18, 1982.

I. *Gulf's Application for Rehearing and Reconsideration*

Gulf asserts that the Commission's December order erred on the following four points: the Commission (1) failed to find that TETCO's customers have not and will not be damaged by Gulf's actions and failed to relieve Gulf of its refund obligation; (2) directed that interest be calculated in accordance with Order Nos. 47 and 47-A;[4] (3) held that Gulf may not recoup the interest accrued after December 15, 1976; and (4) adopted an intervenor's comment regarding the amount of Gulf's refunds. Gulf also requested clarification of certain aspects of the recoupment mechanism.

A. *Gulf's Refund Obligation*

In its application for rehearing of the January order, Gulf argued that TETCO's customers suffered no damages and in fact received substantial benefits from the delay in deliveries. Gulf further argued that proof of damages was required before refunds could be imposed. Based on these arguments, Gulf reasoned that it had no refund obligation and owed no monies.

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[3] Gulf also filed a Motion For Partial Stay Of Commission Order And For Other Relief. The Commission issued an Order Denying Motion But Granting Limited Stay on February 16, 1982.

[4] FERC Statutes and Regulations, ¶ 30,083, ¶ 30,099.

Gulf replays this argument in its present application for rehearing. We discussed the question of Gulf's refund obligation exhaustively in the December order[5] and see no need to belabor the point here.[6] As we stated in the December order, the Commission has determined in Opinion Nos. 780 and 780-A that Gulf owes and should pay refunds. That determination was affirmed by the Third Circuit. The matter is settled.

B. *Calculation Of Interest*

The December order directed Gulf to calculate separately all interest accrued on the refund corpus from December 15, 1976 to the last day of the month preceding the month of issuance of that order. The order further directed that the interest be calculated at 9% per annum, on a simple basis, from December 15, 1976 to October 1, 1979, and at the rate, compounded, prescribed in Order No. 47 thereafter.

Gulf objects to this method of interest calculation. Gulf contends that the 7% and 9% rates set out in Opinion Nos. 780 and 780-A are final and binding and cannot be changed. Gulf also argues that the Commission failed to give it notice that interest would be computed using the rates for amounts collected subject to the refund under Section 4 of the Natural Gas Act (NGA) and Title I of the Natural Gas Policy Act of 1978.

Gulf's contentions are wrong.

The interest rates set out in Opinion Nos. 780 and 780-A were intended only for the refunds accrued at

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[5] Pp. 5-10, (mimeo).

[6] While the December order, at pp. 6-7, referred to Gulf's claims that certain language in Opinion No. 780-A supported its position that proof of damages was necessary, as well as New York's response thereto, it should have also indicated the Commission's agreement with New York's view of the matter.

that time. The opinions contemplated that Gulf would file a refund report on December 15, 1976 and that payment would follow shortly thereafter. The level of interest on these refunds *is* final and binding.

In Opinion Nos. 780 and 780-A, the Commission applied its standard interest rates for refunds to the Gulf refunds. Contrary to the position Gulf now advocates, it has known since 1976 that the interest rates applicable in this proceeding were to be those generally imposed on amounts held subject to refund. In its application for rehearing of Opinion No. 780, Gulf argued that the 7% and 9% rates were inapplicable, in part, because they referred to amounts collected subject to refund under rate filings for proposed rate increases.[7] In rejecting this argument in Opinion No. 780-A, the Commission said that the Commission orders setting those rates were "adopted to prescribe uniform rates of interest in rate suspension cases reflecting current conditions in the money market. *There is no reason to adopt a different interest rate in this proceeding.*"[8] (Emphasis added). Thus Gulf was or should have been aware that the Commission was applying its general interest rate.

The issue of appropriate interest rates was before the Third Circuit which said:

> We also can discern no error in the rates of interest set by the Commission—7 percent per annum for underdeliveries prior to October 10, 1974, and 9 percent thereafter—in the absence of any indication that they are too high other than Gulf's unsupported assertion that they are 'plainly excessive.'[9]

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[7] "Application Of Gulf Oil Corporation For Rehearing And Reconsideration," filed in Docket No. CI64-26, November 12, 1976, pp. 42-43.

[8] 56 F.P.C. 3492, at 3500-3501.

[9] 563 F.2d 588, at 610.

The Third Circuit also cited *American Public Gas Assoc.* v. *FPC*, 546 F.2d 983 (D.C. Cir. 1976). In that case, the Commission had raised the interest rate on refunds to 9%, effective October 10, 1974. The Commission limited imposition of the rate to refunds attributable to rate filings made after October 10, 1974. Producers who had made rate filings prior to October 10, 1974 were permitted to continue to pay at the 7% rate, even if the refunds accrued after October 10, 1974. The D.C. Circuit found this provision to be unreasonable and discriminatory since it:

> . . . deprives those to whom refunds are ordered after October 10, 1974, of the 9% refund interest rate for the period after October 10, 1974, on the excess charges which were collected prior to that date. The Commission's contention that companies should be able to rely upon the interest rate in effect when the filing is made falls of its own weight when carried past the date when the Commission announced its finding that 9% was a fair rate of return on refunds. 546 F.2d 988.

The Third Circuit opinion, taken together with its citation of the *APGA* case, indicates approval for the Commission's application of its general refund interest rate and its adjustment of the rate upward to conform with a change in the Regulations.

In sum, Opinion No. 780-A ties the interest rate in this proceeding to the general rate of interest for amounts held subject to refund which is established by the Commission's regulations. Consequently, it was appropriate and reasonable for the Commission to direct Gulf to calculate interest in accordance with the latest effective rate of interest. This is no more than the Commission did in Opinion No. 780, when it directed that the interest rate increase to 9% as of October 10, 1974 to accord with the then current regulation.

C. *Post-December 15, 1976 Interest*

In the December order the Commission concluded that Gulf was not entitled to recoup the interest accruing on and after December 15, 1976 on the corpus of the refunds.

Gulf argues that it is entitled to recover all of the principal and interest refunded, including the interest relating to the post-December 15, 1976 period. Gulf, however, does not assert any right to any interest accruing after the refunds are placed in escrow. Gulf claims that the Commission in its December 18, 1981 order has confused these two issues.

In our view there is no important difference in the two alleged issues. We agree that under the Third Circuit decision in *Gulf Oil*, Gulf is entitled to recoup the interest payable on the refund principal for the period prior to December 15, 1976, when Gulf was required to file its refund report. It is one thing, however, to allow Gulf to recoup interest for the period prior to actual ascertainment of total damages; it is quite a different matter to allow recovery for the period subsequent thereto. In the latter period it should make no real difference whether Gulf held the refundable amounts and is now required to pay nonrecoupable additional interest for the post-December 15, 1976 period to TETCO's customers for having had the use of their money or, alternatively, the customers were paid the total refunds on December 15, 1976 and thus had the use of such funds from that time forward until Gulf recouped the refund corpus. The result is and should be the same. The rationale used by the Commission in Opinion No. 780-A,[10] for not allowing Gulf to recover the "time value of amounts refunded" applies with equal force to the post-December 15, 1976 period prior to as well as subsequent to the time when Gulf actually makes the refunds.

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[10] 56 F.P.C. 3492, at 3499.

Gulf claims that "December 15, 1976" has no significance as to refunds under Opinion Nos. 780 and 780-A. This is not so. First, pursuant to Ordering Paragraph (B) of Opinion No. 780,[11] Gulf was directed to file, on December 15, 1976, a refund report showing the amount of refund principal plus interest, computed according to the refund formula. Thus, "December 15, 1976" was the first date when the Commission could ascertain the actual refund amount. This amount is what the December order refers to as the refund corpus and what the Third Circuit was referring to when it said that Gulf "will recoup every dollar it has been ordered to refund."[12] Furthermore, pursuant to Ordering Paragraph (A) of Opinion No. 780,[13] Gulf was ordered to deliver gas to TETCO at a rate of 625 MMcf per day, beginning on December 15, 1976, unless TETCO demanded less. Opinion No. 780-A in no way altered the time frame of Opinion No. 780. "December 15, 1976" thus is the date chosen by the Commission for Gulf to comply with both the refund and delivery provisions of the Commission's order, and is an appropriate date to cut off interest recoupment.

Gulf's suggestion that, at the most, only interest accrued during the court stay of the refund provisions of Opinion Nos. 780 and 780-A should be non-recoupable misses the point. While the fact that Gulf obtained a court stay of Opinion Nos. 780 and 780-A pending completion of judicial review of those opinions played a part in the delay involved in Gulf actually making refunds here, it is also true that the Commission took considerable time subsequent to the dissolution of the court stay in resolving the various refund issues raised by the parties. But, whatever the reasons for the delay in actual re-

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[11] 56 F.P.C. 2293, at 2307.

[12] 563 F.2d 588, at 607.

[13] 56 F.P.C. 2293, at 2307.

funding, the fact remains that Gulf retained and had the use of money which it had been determined in Opinion Nos. 780 and 780-A belonged to TETCO's customers until Gulf recouped the refund corpus. This is why Gulf is not allowed to recoup any interest for the post-December 15, 1976 period. In this respect it is similar to previous producer refund cases.[14]

D. *Calculation Of Refunds*

The December order directed Gulf to calculate refund obligations which it incurred after October 31, 1976 on a month-by-month basis.[15] This method was suggested by intervenor New England State Commissions (New England) which pointed out that Gulf's practice of aggregating deficiency volumes and then subtracting similarly aggregated excess delivery volumes for the months subsequent to October 31, 1976 enabled Gulf to understate its interest obligation.[16]

Gulf believes that its refund calculation is not deficient and that the Commission appears to have accepted New England's assertion that Gulf owes $102 million rather than $94 million for this period.

The problem here is one of clarification. Gulf has misread our order. The Commission discussion referred to

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[14] See, for instance, *Amerada Petroleum Corp., et al.*, Docket No. CI62-1544, *et al.*, orders issued July 1, 1968, 40 FPC 1352, 1355, and *Area Rate Proceeding, et al.*, Docket No. AR61-1, *et al.*, order issued August 9, 1968, implementing Opinion Nos. 468 and 468-A, 40 FPC 242 at 244, and *Area Rate Proceeding (Permian Basin)*, Docket No. AR61-1, *et al.*, order issued January 17, 1969, 41 FPC 53, 55.

[15] December order, p. 15 (mimeo).

[16] Instead of calculating refunds plus interest for each month separately, and then adding up the monthly totals, Gulf aggregated all of the deficiency volumes and calculated interest on that one amount.

by Gulf [17] relates to the computation of interest on post-October 31, 1976 underdeliveries, not to New England's assertion that Gulf's refund should be $102 million, rather than $94 million.[18] We reaffirm our decision that deficiencies occurring after October 31, 1976 should be calculated on a monthly basis. We reiterate that the aggregate offsetting of all post-October 31, 1976 deficiencies by all such later excess deliveries accords with neither the methodology of Opinion No. 780 nor is it compatible with the escrow plan we have approved.

E. *Clarification Of The Recoupment Mechanism*

Gulf also requested clarification of certain aspects of the recoupment procedure. One request concerns the recoupment method originally formulated in Opinion No. 780 which will be used in the event that Gulf does not recoup the refund corpus through excess deliveries as provided for in Opinion No. 780-A. Gulf requests clarification that when there remains to be delivered volumes of gas equivalent to the underdeliveries for which refunds have not been recouped (tailend volume recoupment), Gulf may recoup on an Mcf-as-delivered basis a surcharge on those volumes remaining to be delivered. Gulf further requests that the Commission clarify that (1) it need not make a rate change filing but may file a notice of recoupment to collect its monies under this recoupment method and (2) the amount of surcharge shall equal the refund amount on the corresponding RV volume.

In the December order, we determined that Gulf should be required to file a notice of recoupment instead of a rate change filing as part of the procedure for Gulf's col-

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[17] December order, p. 15, (mimeo).

[18] Those figures refer to initial estimates of the refund corpus, before recoupment, and do not reflect the amount of interest accrued after December 15, 1976.

lection of monies from the escrow agent.[19] We will also permit Gulf to file a notice of recoupment for monies recouped through the procedure set forth in Ordering Paragraph (D) of Opinion No. 780. Such a procedure comports with the escrow plan we have approved.

With regard to Gulf's second point concerning the vintage of the tailend recoupment volumes, Opinion No. 780 states as follows:

> (B) When there remains to be delivered under Gulf's contract with Texas Eastern that amount of gas for which refund has been made, Gulf may file a rate change so that the price to Texas Eastern for appropriate volumes shall be the contract price plus the amount of the refund previously paid applicable to the same volumes.[20]

Opinion No. 780-A modified the above paragraph to provide that when:

> . . . Gulf delivers gas to Texas Eastern in an amount greater than 625 MMcf in any one day at Texas Eastern's request, the price shall be the contract price plus a recoupment of an amount of refund previously paid on an equivalent volume of gas, as agreed between Gulf and Texas Eastern.[21]

The two opinions clearly contemplate two separate methods of recoupment of refunds. Only when recoupment is accomplished through excess deliveries may Gulf and Texas Eastern determine the vintage of gas. In the December order, the Commission found the RV method for this type of recoupment fell within the meaning of Opinion No. 780-A and furthered the policy of encouraging early delivery as stated in Opinion No. 780-A. However,

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[19] December order, p. 13, 22 (Ordering Paragraph (D) (mimeo).

[20] 56 F.P.C. 2293, at 2307.

[21] 56 F.P.C. 3492, at 3506.

nothing we said in the December order affects the vintaging method ordered in Opinion No. 780. Consequently, when Gulf begins to recoup through collecting a surcharge on the tailend volumes, the amount recouped shall be calculated on a first-in, first-out basis.[22]

Gulf's second request for clarification concerns the time limit for filing notices of recoupment. Ordering Paragraph (D) requires Gulf to submit a report of excess deliveries, signed and agreed to by TETCO, within 30 days of the end of the month in which such excess deliveries occurred.

Gulf states that because of the vast amount of data and the time necessary to accumulate the data on volumes delivered to Texas Eastern, it may not be possible for it to file a notice of recoupment within a 30 day period. Gulf is concerned that if it is unable to make a timely filing, it may lose its right to recoupment. Gulf therefore interprets the 30 day period to mean that as soon as Gulf is able to file the notice, it shall do so.

Since it is in Gulf's interest to file its notice of recoupment promptly, we will remove the 30-day filing limitation for Gulf's notice of recoupment in Ordering Paragraph (D) of our December order.

II. *TETCO's Motion For Clarification*

Ordering Paragraph (G) of the December order establishes procedures in the event Gulf incurs underdeliveries and refunds in the future. Gulf must file a refund report within 30 days of the end of the month when such underdeliveries occur. The escrow agent will establish a separate escrow account, and the interest from that account will be distributed semiannually.

TETCO is concerned that it does not now have Commission approval of the allocation among its customers of

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[22] See discussion at 56 F.P.C. 2301.

the interest from such additional escrow accounts. TETCO proposes to submit, within 20 days after Gulf files its refund report, a distribution report showing customer entitlements to the additional refunds. TETCO asks that payments be delayed, if necessary, from such accounts until Commission approval. TETCO's proposal is reasonable in light of the fact that its customers change over time, and we will modify the order accordingly.

TETCO also asked us to clarify that Gulf is not required to make a rate change filing but only need file a notice of recoupment when Gulf begins tailend volume recoupment. As we stated earlier in this order, Gulf should file a notice of recoupment and collect the surcharge monies, figured on a FIFO basis, from the escrow agent.

III. *WUL's Application for Rehearing* [23]

WUL contends the Commission erred in not ordering flow-through of the entire refund corpus. It argues that flow-through of *all* monies is mandated by Opinion Nos. 780 and 780-A as affirmed by the Third Circuit. WUL states that, assuming the Commission could change the flow-through procedures, there has been no showing that the reduction in the amount to be flowed-through serves the public interest.

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[23] On January 29, 1982, Gulf filed a Motion to Reject and Strike WUL's Application on the grounds that WUL had not demonstrated aggrievement for purposes of obtaining rehearing and judicial review pursuant to Section 19 of the NGA. WUL filed an answer on February 16, 1982 asserting its right to represent its members whom, WUL argued, would suffer economic injury if the December order stands.

We will deny Gulf's motion. WUL, as representative of its members and their consumer interests, has presented sufficient facts to show real or threatened economic injury to its members. Also, the Commission initially found that WUL's intervention in this proceeding may be in the public interest and we believe that permitting WUL to participate in this stage of the proceeding may also be in the public interest. See 46 F.P.C. 1166.

Essentially, WUL is objecting to the escrow plan we adopted in the December order. As we stated there, the escrow plan is the more administratively practicable method. In addition, TETCO's survey of its customers and the comments filed in response to our January order indicated a preference for the plan. We believe it is in the public interest to endorse a plan that distributes the monies in the least complicated manner and also accords with the customers' wishes.

WUL also objects to the RV (LIFO) method of crediting the excess deliveries. As we pointed out in the December order, the RV method satisfies Opinion No. 780-A's direction that, as regards delivery of excess volumes and recoupment of refunds on them, the vintage of gas whose refund shall be recouped shall be as agreed by Gulf and Texas Eastern. The Commission also found in Opinion No. 780-A that early recoupment would encourage the delivery of volumes in excess of 625 MMcf per day if desired by TETCO and would be in the public interest.

WUL has made no showing which would warrant modification of our December order. We shall deny its application for rehearing.

The Commission orders:

(A) Gulf's application for rehearing and reconsideration, except as provided in Ordering Paragraph (C) herein, and WUL's application for rehearing are denied.

(B) TETCO's Motion For Clarification is granted.

(C) Ordering Paragraph (D) of our December 18, 1981 order is modified to delete the 30-day filing requirement for Gulf's report of excess deliveries (notice of recoupment).

(D) Ordering Paragraph (G) of our December 18, 1981 order is modified to provide that, within 20 days of

Gulf's filing of a refund report, TETCO shall submit a report showing customers' entitlements to the earnings from the additional escrow account. No monies shall be paid from any such additional escrow account until approval of the customer entitlement report by the Commission. Approval of these reports is delegated to the Director, OPPR, in accordance with Ordering Paragraph (J) of our December 18, 1981 order.

(E) Gulf's Motion to Reject and Strike Washington Urban League's Aplication for rehearing is denied.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB,
Secretary

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 82-3035, 82-3132, 82-3137, 82-3166/67 and 82-3242

GULF OIL CORPORATION,
Petitioner in No. 82-3035,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PHILADELPHIA GAS WORKS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PUBLIC SERVICE ELECTRIC AND GAS COMPANY, NEW JERSEY NATURAL GAS COMPANY, WASHINGTON URBAN LEAGUE, THE BROOKLYN UNION GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors.

GULF OIL CORPORATION,
Petitioner in No. 82-3132,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PHILADELPHIA GAS WORKS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, WASHINGTON URBAN LEAGUE, and TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors.

WASHINGTON URBAN LEAGUE,
Petitioner in No. 82-3137,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PHILADELPHIA GAS WORKS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION, and GULF OIL CORPORATION,
Intervenors.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner in No. 82-3166,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

GULF OIL CORPORATION, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors,

THE BROOKLYN UNION GAS COMPANY,
Intervenor.

PHILADELPHIA GAS WORKS,
Petitioner in No. 82-3167,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

GULF OIL CORPORATION,
TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors,

THE BROOKLYN UNION GAS COMPANY,
Intervenor.

GULF OIL CORPORATION,
Petitioner in No. 82-3242,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors,

WASHINGTON URBAN LEAGUE,
Intervenor.

PETITION FOR REVIEW
FEDERAL ENERGY REGULATORY COMMISSION
(CI64-26)

Argued January 7, 1983

Before: ALDISERT, GIBBONS and HIGGINBOTHAM, *Circuit Judges.*

(Opinion filed April 21, 1983)

Present: ALDISERT, GIBBONS and HIGGINBOTHAM, *Circuit Judges.*

REVISED JUDGMENT

These causes came on to be heard on the records from the Federal Energy Regulatory Commission and were argued by counsel on January 7, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the petitions for review from the orders of said Federal Energy Regulatory Commission, filed January 17, 1979, and December 18, 1981 (C.A. No. 82-3035); December 18, 1981, and March 29, 1982 (C.A. No. 82-3132); December 18, 1981, (C.A. No. 82-3137); and March 29, 1982, April 12, 1982, and June

3, 1982 (C.A. No. 82-3242), be and the same are hereby denied and the orders of said Commission affirmed.

It is further ordered and adjudged that the petitions for review filed from the orders of said Commission issued January 22, 1982, and April 12, 1982 (C.A. Nos. 82-3166 and 82-3167), and January 22, 1982 (C.A. No. 82-3137) be and the same are hereby granted and the orders of the said Commission reversed and the causes remanded for a determination of the appropriate number of volumes attributable to *force majeure* in a way that is consistent with the opinion of this Court.

Costs taxed against petitioner in C.A. Nos. 82-3035, 82-3242 and 82-3132. Costs taxed against respondent in C.A. Nos. 82-3166 and 82-3167. On 82-3137, each party to bear its own costs.

ATTEST:

/s/ Sally Mrvos
Clerk

Dated: June 15, 1983

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 82-3035, 82-3132, 82-3137, 82-3166/67 and 82-3242

GULF OIL CORPORATION,
Petitioner in No. 82-3035,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PHILADELPHIA GAS WORKS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PUBLIC SERVICE ELECTRIC AND GAS COMPANY, NEW JERSEY NATURAL GAS COMPANY, WASHINGTON URBAN LEAGUE, THE BROOKLYN UNION GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors.

GULF OIL CORPORATION,
Petitioner in No. 82-3132,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PHILADELPHIA GAS WORKS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, WASHINGTON URBAN LEAGUE, and TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors.

WASHINGTON URBAN LEAGUE,
Petitioner in No. 82-3137,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PHILADELPHIA GAS WORKS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION, and GULF OIL CORPORATION,
Intervenors.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner in No. 82-3166,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

GULF OIL CORPORATION, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors,

THE BROOKLYN UNION GAS COMPANY,
Intervenor.

PHILADELPHIA GAS WORKS,
Petitioner in No. 82-3167,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

GULF OIL CORPORATION,
TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors,

THE BROOKLYN UNION GAS COMPANY,
Intervenor.

GULF OIL CORPORATION,
Petitioner in No. 82-3242,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors,

WASHINGTON URBAN LEAGUE,
Intervenor.

PETITION FOR REVIEW
FEDERAL ENERGY REGULATORY COMMISSION
(CI64-26)

Present: ALDISERT, GIBBONS and HIGGINBOTHAM, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the records from the Federal Energy Regulatory Commission and were argued by counsel on January 7, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the petitions for review from the orders of said Federal Energy Regulatory Commission, filed January 17, 1979, and December 18, 1981 (C.A. No. 82-3035); December 18, 1981, and March 29, 1982 (C.A. No. 82-3132); December 18, 1981, January 22, 1982, and March 29, 1982 (C.A. No. 82-3137); and March 29, 1982, April 12, 1982, and June 3, 1982 (C.A. No. 82-3242), be and the same are hereby denied and the orders of said Commission affirmed.

It is further ordered and adjudged that the petitions for review filed from the orders of said Commission issued Januray 22, 1982, and April 12, 1982 (C.A. Nos.

82-3166 and 82-3167) be and the same are hereby granted and the orders of the said Commission reversed and the causes remanded for a determination of the appropriate number of volumes attributable to *force majeure* in a way that is consistent with the opinion of this Court.

Costs taxed against petitioners in C.A. Nos. 82-3035, 82-3242, 82-3132 and 82-3137. Costs taxed against respondent in C.A. Nos. 82-3166 and 82-3167.

ATTEST:

/s/ Sally Mrvos
Clerk

Dated: April 21, 1983

APPENDIX J

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 82-3035, 82-3132, 82-3137, 82-3166/67 and 82-3242

GULF OIL CORPORATION,
Petitioner in No. 82-3035,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PHILADELPHIA GAS WORKS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PUBLIC SERVICE ELECTRIC AND GAS COMPANY, NEW JERSEY NATURAL GAS COMPANY, WASHINGTON URBAN LEAGUE, THE BROOKLYN UNION GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors.

GULF OIL CORPORATION,
Petitioner in No. 82-3132,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PHILADELPHIA GAS WORKS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, WASHINGTON URBAN LEAGUE, and TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors.

WASHINGTON URBAN LEAGUE,
Petitioner in No. 82-3137,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PHILADELPHIA GAS WORKS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION, and GULF OIL CORPORATION,
Intervenors.

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner in No. 82-3166,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

GULF OIL CORPORATION, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors,

THE BROOKLYN UNION GAS COMPANY,
Intervenor.

PHILADELPHIA GAS WORKS,
Petitioner in No. 82-3167,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

GULF OIL CORPORATION,
TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors,

THE BROOKLYN UNION GAS COMPANY,
Intervenor.

GULF OIL CORPORATION,
Petitioner in No. 82-3242,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
TEXAS EASTERN TRANSMISSION CORPORATION,
Intervenors,

WASHINGTON URBAN LEAGUE,
Intervenor.

PETITION FOR REVIEW
FEDERAL ENERGY REGULATORY COMMISSION
(CI64-26)

Argued January 7, 1983

Before: ALDISERT, GIBBONS and HIGGINBOTHAM, *Circuit Judges.*

(Opinion filed April 21, 1983)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, GIBBONS, HIGGINBOTHAM and BECKER, *Circuit Judges*

The petition for rehearing filed by the Gulf Oil Corporation, appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

/s/ A. Leon Higginbotham
Circuit Judge

Dated: June 15, 1983

APPENDIX K

NATURAL GAS ACT,
15 U.S.C. § 717, *et seq.*

SECTION 7.

Construction, extension, or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings.

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present

or future public convenience or necessity permit such abandonment.

(c) (1) (A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application

for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

* * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.
[56 Stat. 84 (1942); 15 U.S.C. § 717f]

* * * *

SECTION 16.

Administrative powers of Commission; rules, regulations, and orders.

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. (June 21, 1938, ch. 556, § 16, 52 Stat. 830.)
[15 U.S.C. § 717o]

* * * *

SECTION 19

Rehearings; court review of orders.

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issu-

ance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Com-

mission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. (June 21, 1938, ch. 556, § 19, 52 Stat. 831; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub. L. 85-791, § 19, 72 Stat. 947.)
[15 U.S.C. § 717r]

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APPENDIX L

ADMINISTRATIVE PROCEDURE ACT

* * * *

§ 553. Rule making

* * * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules

adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.

* * * *

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

* * * *

APPENDIX M

FEDERAL POWER ACT SECTION 313, 16 U.S.C. § 8251

§ 825*l*. Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for re-

hearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically

ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

June 10, 1920, c. 285, § 313, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 860, and amended June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 16, 72 Stat. 947.

APPENDIX N

NATURAL GAS POLICY ACT,

15 U.S.C. § 3301 *et seq.*

§ 3414. Enforcement

(a) General rule.—It shall be unlawful for any person—

(1) to sell natural gas at a first sale price in excess of any applicable maximum lawful price under this chapter; or

(2) to otherwise violate any provision of this chapter or any rule or order under this chapter.

(b) Civil enforcement.—

(1) In general.—Except as provided in paragraphs (2) and (3), whenever it appears to the Commission that any person is engaged or about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter, or of any rule or order thereunder, the Commission may bring an action in the District Court of the United States for the District of Columbia or any other appropriate district court of the United States to enjoin such act or practice and to enforce compliance with this chapter, or any rule or order thereunder.

(2) Enforcement of emergency orders.—Whenever it appears to the President that any person has engaged, is engaged, or is about to engage in acts or practices constituting a violation of any order under section 3362 of this title or any order or supplemental order issued under section 3363 of this title, the President may bring a civil action in any appropriate district court of the United States to enjoin such acts or practices.

(3) Enforcement of incremental pricing.—The Secretary, the Commission, or, on the request of the Secretary of Energy or the Commission, the Attorney General, may institute a civil action for injunctive or other equitable relief as may be appropriate to assure compliance with the provisions of section 3345 of this title requiring the passthrough of surcharges paid under section 3344 of this title by any local distribution company with respect to nautral [1] gas delivered to incrementally priced industrial facilities served by such company. Such action may be instituted in any district court of the United States in the State in which such local distribution company conducts business or in the District Court of the United States for the District of Columbia.

(4) Relief available.—In any action under paragraph (1), (2), or (3), the court shall, upon a proper showing, issue a temporary restraining order or preliminary or permanent injunction without bond. In any such action, the court may also issue a mandatory injunction commanding any person to comply with any applicable provision of law, rule, or order, or ordering such other legal or equitable relief as the court determines appropriate, including refund or restitution.

(5) Criminal referral.—The Commission may transmit such evidence as may be available concerning any acts or practices constituting any possible violations of the Federal antitrust laws to the Attorney General who may institute appropriate criminal proceedings.

(6) Civil penalties.—

(A) In general.—Any person who knowingly violates any provision of this chapter, or any

[1] So in original. Probably should be "natural".

provision of any rule or order under this chapter, shall be subject to—

(i) except as provided in clause (ii) a civil penalty, which the Commission may assess, of not more than $5,000 for any one violation; and

(ii) a civil penalty, which the President may assess, of not more than $25,000, in the case of any violation of an order under section 3362 of this title or an order or supplemental order under section 3363 of this title.

(B) Definition of knowing.—For purposes of subparagraph (A), the term "knowing" means the having of—

(i) actual knowledge; or

(ii) the constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances.

(C) Each day separate violation.—For purposes of this paragraph, in the case of a continuing violation, each day of violation shall constitute a separate violation.

(D) Statute of limitations.—No person shall be subject to any civil penalty under this paragraph with respect to any violation occurring more than 3 years before the date on which such person is provided notice of the proposed penalty under subparagraph (E). The preceding sentence shall not apply in any case in which an untrue statement of material fact was made to the Commission or a State or Federal agency by, or acquiesced to by, the violator with respect to the acts or omissions constituting such violation, or if there was omitted a material

fact necessary in order to make any statement made by, or acquiesced to by, the violator with respect to such acts or omissions not misleading in light of circumstances under such statement was made.

(E) Assessed by commission.—Before assessing any civil penalty under this paragraph, the Commission shall provide to such person notice of the proposed penalty. Following receipt of notice of the proposed penalty by such person, the Commission shall, by order, asssess[2] such penalty.

(F) Judicial rev w.—If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (E), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.

(c) Criminal penalties.—

(1) Violations of chapter.—Except in the case of violations covered under paragraph (3), any person who knowingly and willfully violates any provision of this chapter shall be subject to—

(A) a fine of not more than $5,000; or

(B) imprisonment for not more than two years; or

(C) both such fine and such imprisonment.

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[2] So in original. Probably should be "assess".

(2) Violation of rules or orders generally.—Except in the case of violations covered under paragraph (3), any person who knowingly and willfully violates any rule or order under this chapter (other than an order of the Commission assessing a civil penalty under subsection (b)(4)(E) of this section), shall be subject to a fine of not more than $500 for each violation.

(3) Violations of emergency orders.—Any person who knowingly and willfully violates an order under section 3362 of this title or an order or supplemental order under section 3363 of this title shall be fined not more than $50,000 for each violation.

(4) Each day separate violation.—For purposes of this subsection, each day of violation shall constitute a separate violation.

(5) Definition of knowingly.—For purposes of this subsection, the term "knowingly", when used with respect to any act or omission by any person, means such person—

(A) had actual knowledge; or

(B) had constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances.

(Pub.L. 95-621, Title V, § 504, Nov. 9, 1978, 92 Stat. 3401.)